TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 642.

J. M. TURNER AND J. M. WELLBORN, PLAINTIFFS IN ERROR,

vs.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND O. C. WRIGHT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED DECEMBER 19, 1898.

(17,227.)

(17,227.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 15, 1899.

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1 In the Supreme Court, September Term, 1898.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright
vs.
CLARENCE CALL, Treasurer of Wilkes County, and J. M. TURNER and J. M. Wellborn.

The above-named defendants, considering themselves aggrieved by the judgment and decision of the supreme court of North Carolina rendered on the 9th day of November, 1898, excepts to said judgment and decision and prays for a writ of error, to the end that said judgment and decision may be inquired into by the Supreme Court of the United States and all errors found by them be reversed. Wherefore *he* prays that said writ of error be granted and a transcript of the record and proceeding and papers upon which said judgment and decision were rendered, duly authenticated, may be sent to the Supreme Court of the United States.

Raleigh, N. C., Nov. 24th, 1898.

R. N. HACKETT,
Attorney for Defendants J. M. Turner and J. M. Wellborn.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit wherein Clarence Call, treasurer of Wilkes county, N. C., and J. M. Turner and J. M. Wellborn were defendants, wherein was drawn in question the validity of a
2 statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error has happened, to the great damage of the said J. M. Turner and J. M. Wellborn, as by *his* complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 20th day of Dec., 1898, in the said Supreme Court, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

said Supreme Court, the 24th day of Nov., 1898, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the one hundred and twenty-third.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed by—
W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

3 Endorsed as follows: J. M. Turner and J. M. Wellborn, plaintiffs in error, *vs.* The Board of Commissioners of Wilkes County and C. C. Wright. Petition and writ of error. I accept service of the within petition and writ of error this the 25th of November, 1898. A. C. Avery, attorney for the Board of Commissioners of Wilkes County and C. C. Wright.

4 In the Supreme Court, September Term, 1898.

J. M. TURNER and J. M. WELLBORN, Plaintiffs in Error,
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright, Defendants in Error.

UNITED STATES OF AMERICA, *ss:*

To the Board of Commissioners of Wilkes County and C. C. Wright, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, on the 20th day of Dec., 1898, pursuant to a writ of error filed in the clerk's office of the supreme court of North Carolina, wherein J. M. Turner and J. M. Wellborn are plaintiffs in error and The Board of Commissioners of Wilkes County and C. C. Wright are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff- in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness W. T. Faircloth, chief justice of the supreme court of North Carolina, this the 25th day of November, 1898.

W. T. FAIRCLOTH,
Chief Justice of the Supreme Court of North Carolina.

5 Endorsed as follows: J. M. Turner and J. M. Wellborn, plaintiffs in error, *vs.* The Board of Commissioners of Wilkes County and C. C. Wright. Citation. I accept service of the within citation this the 25th of November, 1898. A. C. Avery, attorney for the Board of Commissioners of Wilkes County and C. C. Wright.

6 STATE OF NORTH CAROLINA:

In the Supreme Court.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright
vs.
CLARENCE CALL, Treasurer of Wilkes County, and J. M. TURNER and J. M. Weliborn.

Assignment of Errors.

The above-named defendants, J. M. Turner and J. M. Wellborn, consider themselves aggrieved by the judgment and decision of the supreme court of North Carolina rendered on the 9th day of November, 1898, and complain that the said judgment and decision was erroneous, and assign as error that:

1st. That the court erred in the holding that the original charter of the North Western North Carolina Railroad Company and the amendment thereto, enacted in the year 1868, did not authorize the board of commissioners of Wilkes county to submit the question whether said county should subscribe to the capital stock of said company or to subscribe one hundred thousand dollars, with the approval of the qualified voters of said county, to the capital stock of said company.

2nd. That the court erred in holding that the subscription of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company by the board of commissioners of Wilkes county was not authorized by the amendments to the charter of the said North Western North Carolina Railroad Company enacted after the year 1868.

7 3rd. That the court erred in holding that the subscription of one hundred thousand dollars to the capital stock of the North Western North Carolina Railroad Company by the board of commissioners of Wilkes county was not authorized by the provisions of the Code of North Carolina, contained in sections 1996 to 2000, inclusive, or by any other statute.

4th. That the court erred in holding that the holders of any or all of the one hundred thousand dollars in bonds executed by the board of commissioners of Wilkes county and exchanged for the capital stock of the North Western North Carolina Railroad Company, the validity of which was the subject of controversy in this action, were estopped by the recitals in the face of the bonds issued as to the legislation relied upon to authorize the issue of said bonds.

R. N. HACKETT,

Attorney for J. M. Turner and J. M. Wellborn.

8 Endorsed as follows: J. M. Turner and J. M. Wellborn, plaintiffs in error, *vs.* The Board of Commissioners of Wilkes County and C. C. Wright. Assignment of errors. I accept service of the within assignment of errors this the 25th of November, 1898. A. C. Avery, attorney for the Board of Commissioners of Wilkes County and C. C. Wright.

9 BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright
against
CLARENCE CALL, Treasurer of Wilkes County, and J. M. TURNER and J. M. Wellborn.

In pursuance of an understanding with and at the request of Richard N. Hackett, attorney for J. M. Wellborn and J. M. Turner, I agree that the following amendment may be added to each assignment of error in the transcript of appeal and may be printed as a part of and at the end of each assignment, as if originally incorporated therein, to wit:

"And the said J. M. Turner and J. M. Wellborn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff board."

A. C. AVERY,
Attorney for the Board of Commissioners of Wilkes County and for C. C. Wright.

December 13, 1898.

10

Bond.

In the Supreme Court, September Term, 1898.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright
vs.
CLARENCE CALL, Treasurer of Wilkes County, and J. M. TURNER and J. M. Wellborn.

Bond on writ of error.

Know all men by these presents that we, J. M. Turner and J. M. Wellborn, as principal-, and R. A. Spainhour and S. J. Ginnings, as sureties, are held and firmly bound unto the Board of Commissioners of Wilkes County and C. C. Wright in the full and just sum of one thousand dollars, to be paid to the Board of Commissioners of Wilkes County and C. C. Wright, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the 23rd day of November, 1898.

Whereas lately, at a term of the supreme court of North Carolina, in a suit depending in said court between The Board of Commissioners of Wilkes County and C. C. Wright, as plaintiffs, and Clarence Call, treasurer of Wilkes county, and J. M. Turner and J. M. Wellborn, as defendants, a judgment was rendered in favor of the plaintiffs and against the defendants, and the said defendants, J. M. Turner and J. M. Wellborn, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse

the judgment in the aforesaid suit, and a citation having issued, directed to said plaintiffs, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, on a day named in said citation:

Now, the condition of the above obligation is such that if the said J. M. Turner and J. M. Wellborn shall prosecute said
11 writ to effect and answer all damages and costs if they, the said J. M. Turner and J. M. Wellborn, fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

J. M. TURNER. [SEAL.]
J. M. WELLBORN. [SEAL.]
R. A. SPAINHOUR. [SEAL.]
S. J. GINNINGS. [SEAL.]

R. A. Spainhour, being duly sworn, says that he is worth the sum of five hundred dollars over and above the amount of his homestead and personal property exemptions and his indebtedness.

R. A. SPAINHOUR. [SEAL.]

Sworn to and subscribed before me this 23rd day of November, 1898.

A. M. VANNOY, *C. S. C.*,
By H. J. SMOOK, *D. C.*

S. J. Ginnings, being duly sworn, says that he is worth the sum of five hundred dollars over and above the amount of his homestead and personal property exemptions and his indebtedness.

S. J. GINNINGS. [SEAL.]

Sworn to and subscribed before me this the 23rd day of November, 1898.

A. M. VANNOY, *C. S. C.*,
By H. J. SMOOK, *D. C.* [L. S.]

Approved — 25 day of November, 1898.

W. T. FAIRCLOTH,
Chief Justice of North Carolina.

12 Record from superior court of Wilkes county.

Agreement of Parties.

It is agreed that in addition to the pleadings, and exhibits and affidavits offered at the former hearing, the original charter of the Northwestern North Carolina Railroad Company passed by the constitutional convention of 1868, and all amendments thereto, including the amendatory acts of 1879 and 1881, shall be considered in evidence, and that the amendments passed in 1879 and 1881, purporting to give to another authority to submit the question of subscription to the capital stock of the company, were not passed by the house of representatives in accordance with the requirements of the constitution and the certified exhibits from the journals of

said sessions need not be offered or sent up as a part of the testimony.

It is agreed that the only legislation that is relied upon to give such authority, is the original charter, passed as an ordinance of the constitutional convention of 1868, and the general statute enacted in 1868 as chapter —, being in the same language as contained in the Code, sections 1996 to 2000, both inclusive.

It is further agreed that the plaintiff still objects to the testimony offered for the defendant Call on the former hearing to show when the Northwestern North Carolina Railroad Company was organized, or incorporated.

(Signed) A. C. AVERY,
Attorney for Plaintiffs.

(Signed) RICHARD N. HACKETT,
Attorney for Defendants J. M. Turner and J. M. Wellborn.

Summons.

To the coroner of Wilkes county, Greeting:

You are hereby commanded to summon Clarence Call, sheriff, and *ex officio* treasurer of Wilkes county, the defendant above named, if he be found in your county, to be and appear before the judge of our superior court, at a court to be held in the county of Wilkes, at the court-house in Wilkesboro, on the first Monday after the fourth Monday of February, it being the 7th day of March, 1898, and answer the complaint, which will be deposited in the office of the clerk of the superior court of said county, within the first three days of said term; and let the said defendant take notice, that if he fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Hereof fail not, and of this summons make due return.

Given under my hand and seal of said court, this 23d day of December, 1897.

(Signed) A. M. VANNOY,
Clerk Superior Court.

We acknowledge ourselves bound unto Clarence Call, sheriff and *ex officio* treasurer of Wilkes county, the defendant in this
13 action, in the sum of two hundred dollars, to be void, however, if the plaintiffs, The Board of Commissioners of Wilkes County, and C. C. Wright shall pay to the defendant all such costs as the defendant may recover of the plaintiff in this action.

Witness our hands and seals this 23d day of December, 1897.

(Signed) C. C. WRIGHT, [SEAL.]
Chairman pro Tem.

(Signed) R. A. SPAINHOUR. [SEAL.]

Bonds.

We, the undersigned, acknowledge ourselves indebted to the defendant in the above-entitled order in the sum of two hundred

dollars, to be void on condition that the plaintiffs in said action will pay to said defendant such damage, not exceeding said sum of two hundred dollars, as said defendant may sustain by reason of the injunction granted them, if the court shall finally decide that the plaintiff was not entitled thereto.

In witness whereof, we have hereunto set our hand and affixed our seal this the 5th day of January, 1898.

THE BOARD OF COUNTY COMMISSIONERS
OF WILKES COUNTY,
By C. C. WRIGHT, *Chairman pro Tem.*

(Signed) C. C. WRIGHT. [SEAL.]
(Signed) R. A. SPAINHOUR. [SEAL.]

R. A. Spainhour, surety to the foregoing undertaking, maketh oath before me, that he has property over and above his homestead and personal property exemptions, and al- other liabilities, worth the sum of two hundred dollars, the amount mentioned in said undertaking.

(Signed) R. A. SPAINHOUR.

Sworn to and subscribed before me this 5th day of January, 1898; and I hereby affirm the surety to the undertaking, and adjudge it sufficient.

(Signed) A. M. VANNOY, *Clerk.*

Complaint.

The plaintiffs complain and allege:

1. That P. A. Lomax is chairman of the board of county commissioners of Wilkes county; and that W. C. Myers, C. C. Wright, A. M. Church, and R. P. Yates, are county commissioners, an- act with said chairman in discharging the duties as such of the plaintiff board; and that the plaintiff, C. C. Wright, is a resident citizen and tax-payer of the county of Wilkes.

2. That the defendant, Clarence Call, is sheriff, and by virtue of statutes so providing, has been made an *ex officio* treasurer of the county of Wilkes, and is charged with the duty of receiving and disbursing the moneys of said county.

3. That the Northwestern North Carolina Railroad Company was duly incorporated and organized under an ordinance of the constitutional convention of 1868, which was published as chapter 17 of the Constitution and Ordinances and Resolutions of the Constitutional Convention of 1868.

4. That the General Assembly, at its session of 1869–1870, passed an act (which was published as chapter 100 of the Laws of 1869 and 1870), by the terms of which act it was provided that the State of North Carolina might loan to the said railroad company its bonds if secured by mortgage deeds, conveying the franchise and property of said company, the said bonds to be furnished in installments, as the grading of the line of said railroad should progress; and it was further provided by said act that all acts of the General Assembly theretofore passed, authorizing the issuing of bonds to the State to

aid in the completion of the first division as a subscription to the capital stock of said company, be repealed; and the General Assembly of North Carolina, at its session of 1870–1871, passed
14 an act, which is entitled "An act to enable the Northwestern North Carolina Railroad Company to complete their road to Salem" (which is published as chapter 178 of the Laws of 1870–1871), by the terms of which said act the said company was authorized to consolidate with any other company whose line was then built, or to be built and connected with its line, providing such company should agree and contract to finish the line of the Northwestern North Carolina railroad from Greensboro to Salem.

5. That no authority was granted by the State or purported to be granted by the terms of said original charter, or of any of the amendments thereto, hereinbefore mentioned, to any county in the State of North Carolina to subscribe to the capital stock of said company or to create any indebtedness upon any terms or conditions in order to aid in the completion of the line of said company.

6. That the General Assembly, at its session of 1871–1872, passed an act (published as chapter 25 of the Laws of 1871–1872), entitled "An act to amend the charter of the Northwestern North Carolina railroad and for other purposes;" and also at the same session passed another act (which is published as chapter 47 of the Laws of 1871–1872), entitled "An act supplementary to an act, entitled An act to amend the charter of the Northwestern North Carolina Railroad Company," and for other purposes, by the terms of which act it was provided that, upon the acceptance of the amendment of the charter of the said company, the mortgages theretofore executed by said company to the State of North Carolina, to secure loans to said company, should be cancelled; and thereafter the Northwestern North Carolina Railroad Company should be authorized to issue bonds of the company and execute a mortgage deed upon its franchise and property to secure the payment of the principal and interest upon said bonds as they shall fall due. All of said enactments hereinbefore mentioned, as passed by the General Assembly, were duly accepted by the Northwestern North Carolina Railroad Company as amendments to its charter, and became parts thereof; and after their acceptance the State of North Carolina no longer had any interest in the said company, nor did any county in said State, or the citizens of any such county, have any pecuniary interest in said company.

7. That the General Assembly of North Carolina at its session of 1872–1873, passed an act (published as chapter 140 of the Laws of 1872–1873), which so amended the charter of the said company as to authorize subscription to, its capital stock to be paid in real estate; but that no amendment to the charter of said company, and no other statute passed by the General Assembly of the State of North Carolina prior to the 20th day of February, A. D. 1879, granted or purported to grant authority to any county to subscribe to the capital stock of the said Northwestern North Carolina Railroad Company; and that prior to the said 20th day of February the said company was not authorized to build any line of railroad,

except that extending from the town of Greensboro, in Guilford county, to the town of Winston, in Forsyth county, or to extend its line of railroad to or into the county of Wilkes.

8. That the General Assembly, at its session of 1879, passed an act (published as chapter 43 of the Laws of 1879), entitled An act to amend the charter of the Northwestern North Carolina Railroad Company, for the construction of a second division from the town of Winston-Salem, in Forsyth county, by the Yadkin valley in Wilkesboro, to Patterson's factory, Caldwell county. It was provided in the first section of said act that the said company should be authorized and empowered to extend its line by way of Jonesboro and Wilkesboro, in the county of Wilkes, to Patterson's factory, in the county of Caldwell; and section 4 of said act purported to authorize any county in the State of North Carolina to subscribe to the capital stock of said company, when so authorized to do by a vote of the qualified voters of said county; but the said act, in so far as it purported to give such authority, was unconstitutional, null and void, because, when the said act was read the second time and put upon its passage on its second reading in the house of representatives of the General Assembly of North Carolina, there was no call of the ayes and noes, and the vote upon such reading was not recorded in the Journal of the House of Representatives, as required by the constitution of North Carolina.

9. That subsequent to the enactment of the last-named act, of the 20th day of February, 1879, the board of commissioners of Wilkes county ordered an election under the provisions of section 4 of said act, which, as the plaintiffs are advised, was null and void (a full transcript of all the proceedings of the board of commissioners of Wilkes county in relation to said election, and to the subscription of the capital stock of the Northwestern North Carolina Railroad Company, which it is claimed was authorized by said vote, being hereto attached, marked Exhibit "A," except that the names of judges of election are omitted, as well as the statement of the vote by townships. It is admitted that at said election a majority of the qualified voters of Wilkes county voted a ticket, whereon was written or printed the word "Railroad.") The plaintiffs are advised and believe that there was no authority for holding said election for the purpose of authorizing such subscription as held then other than that purporting to be granted by section 4, chapter 43 of the Laws of 1879, which, for the reason hereinbefore stated, was null and void.

10. That after said election was held, as aforesaid, the said Northwestern North Carolina Railroad Company abandoned its claim to demand a subscription from the plaintiff or the county of Wilkes, conceding that said election was held without authority; and that if authorized, the said railroad company had forfeited its right to demand that board of commissioners of Wilkes county should subscribe to its capital stock, by failure to comply with the conditions upon which said subscription was made.

11. That on the 8th day of October, 1888, a petition was presented

to the board of commissioners of the county of Wilkes, asking that another election be ordered, to pass upon the question whether said company should subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and in response to said petition an election was accordingly ordered and held on the 6th day of November, 1888, at which election a majority of the qualified voters of Wilkes county voted tickets whereon was written or printed, "Subscription." A full transcript of all proceedings of the board of commissioners of Wilkes county, in relation to the authorizing and holding said election, and the declaration of the result, as well as the making of a subscription of one hundred thousand dollars in coupon bonds to the capital stock of said company, and the issue and delivery of said bonds to said company, is hereto attached, marked Exhibit "B." The plaintiffs admit that at the said election the majority of the qualified voters of Wilkes county cast their ballots in favor of the subscription of one hundred thousand dollars to the capital stock of said company. The plaintiffs are advised, informed and
16 believe that no authority had been granted in sections 1900 to 2000, both inclusive, of the Code of North Carolina; and that neither the county of Wilkes nor the citizens of said county had any pecuniary interest or interest in contemplation of law in the said railroad company at the time that said election was held; and plaintiffs are therefore advised, informed and believe that the said subscription of one hundred thousand dollars, purporting to have been made by the board of commissioners of Wilkes county, was unauthorized; and that the coupon bonds, amounting to one hundred thousand dollars, issued under the color of authority, claimed to be given by said sections of the Code and said election, are invalid, null and void.

12. That accordingly, as appears more fully in the orders embodied in Exhibit "B," hereto attached, in pursuance of a contract, bearing date October 1, 1888, the board of commissioners of Wilkes county caused the said bonds first thirty-three thousand dollars, according to the face value of the same, and subsequently the remaining sixty-seven thousand dollars, to be delivered to the president of said Northwestern North Carolina Railroad Company, reciting upon the face of said bonds that they were issued by virtue of an election held in accordance with the provisions of said sections of the Code of North Carolina; and since the issuing of said bonds, the commissioners of said county have annually levied a tax to meet the interest on the same as it accrued; and out of the money derived from said special levy, have caused the said interest to be paid, and have taken up the coupons attached to said bonds, said bonds were each (omitting the coupons attached) in form as set forth in a paper hereto attached, marked Exhibit No. 1.

13. That there is now, or ought to be, in the hands of the defendant, Clarence Call, as treasurer of said county, about — dollars, of the funds levied and collected for the purpose of paying the interest on said bonds; and that the said Call, as sheriff, has collected and has or ought to have turned over to himself as treasurer, the

moneys levied for the purpose of meeting the interest on said bonds as it may fall due.

14. That the defendant, Clarence Call, in his capacity as treasurer, has been in the habit of paying the interest on said bonds, and taking up the coupons as such interest fell due, without awaiting the orders or direction of the plaintiff board. That as plaintiffs are advised, informed and believe, the said Call recently communicated with some of the holders of the bonds and advised them to deliver their coupons and receive the interest from him, lest some proceeding might be instituted to enjoin its payment; and the plaintiffs are informed and believe that the said Call will continue to apply the funds given into his hands under said levy as sheriff, and turn over to himself in the capacity of treasurer, in payment of the interest on said bonds, unless restrained from doing so by the order of some court of competent jurists; the plaintiffs are advised, informed and believe that if the said Call, as treasurer, shall apply said moneys in his hands to the payment of said interest, although said bonds may be in contemplation of law, invalid, neither the said Call, nor the sureties on his official bond, as treasurer, can be held accountable for such application of said moneys, and therefore the plaintiffs will suffer irreparable damage, unless he shall be restrained from making said payments.

Wherefore, plaintiffs demand judgment:

1. That the said coupon bonds, amounting to one hundred thousand dollars, purporting to have been issued by virtue of a vote in favor of subscription by a majority of the qualified voters in Wilkes county, be declared invalid, null and void.

17 2. That defendant, Clarence Call, as *ex officio* treasurer of the county of Wilkes, be perpetually enjoined and restrained from paying any portion of the principal or interest on the said bonds issued by the board of commissioners of Wilkes county in payment of a subscription to the Northwestern North Carolina Railroad Company.

3. For such other and further relief as to the court may seem just.

4. For the costs of action.

(Signed) A. C. AVERY, *Attorney.*

C. C. Wright maketh oath before me, that the facts set forth in the foregoing affidavit or complaint, as of his own knowledge, are true; and those stated on information and belief he believes to be true.

(Signed) C. C. WRIGHT.

Sworn and subscribed before me, this the 31st day of December, 1897.

WILL P. RAGAN,
Notary Public.

EXHIBIT "A."

Whereas, a petition in accordance with law has been presented to us, asking that an election be ordered in the county of Wilkes on the 16th day of June, 1887, for the purpose of submitting to the people a proposition to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina railroad.

It is now ordered by us, the commissioners of Wilkes county, that an election be held on the said 16th day of June, 1887; and that a vote be taken in the county of Wilkes as to whether they will subscribe one hundred thousand dollars to the capital stock of the railroad aforesaid.

It is further ordered, in accordance with the proposition submitted to us by the Richmond and Danville Railroad Company for the extension of the Northwestern North Carolina railroad, that in case that a majority of the qualified voters of Wilkes county shall vote for said subscription, the commissioners shall issue bonds payable at the Wachovia National Bank of Winston, N. C., not less than ten, nor more than forty years (as to the commissioners shall seem best), after date said bonds bearing interest at six per cent. per annum, payable semi-annually, said bonds to be placed in the hands of a trustee, to be selected by the commissioners, and one-third of the bonds to be delivered to the railroad authorities when the road is constructed and the cars running to a point one-half of the distance between Wilkesboro, in Wilkes county, and Elkin, in Surry county; and the remaining two-thirds of the bonds, on the completion of the road and the running of the trains to the town of Wilkesboro (or a point just across the river), said bonds to be in denominations of not less than one thousand dollars nor more than five thousand dollars, interest to be paid on said bonds only from the time of their delivery.

It is further ordered, in accordance with the proposition submitted to the commissioners by the Richmond and Danville railroad, the railroad must commence work in the county of Wilkes in ninety days after the subscription is voted, and shall continue said work until said road shall be completed, which shall be in eighteen months thereafter; and upon the failure of said road to commence work in ninety days, to couple their line from Wilkesboro to Winston in eighteen months, as above set forth, then said subscription to said road is to be null and void, and the railroad company shall have no right to demand the bonds issued by the county, but the
18 trustee, in whose hands the bonds are, shall deliver them up to the county commissioners, to be cancelled upon the bonds being issued and delivered, the railroad company (the Northwestern North Carolina railroad) shall issue to the county of Wilkes certificate of stock to the amount of one hundred thousand dollars in the capital stock of the Northwestern North Carolina Railroad Company. The said election shall be held under the same provisions, laws and regulations as in the case of the regular State and county elections.

The above order is made at the request of the Richmond and Danville railroad, and with their full concurrence.

(Signed) R. B. GLENN,
Attorney for R. & D. R. R. Co.

Whereas, the Richmond and Danville Railroad Company has made a proposition to the board of county commissioners of Wilkes county to extend the Northwestern North Carolina railroad from Winston, N. C., to Wilkesboro, N. C., in the event that Wilkes county will subscribe one hundred thousand dollars to the capital stock of the said railroad company, to be paid in bonds of said county, according to agreement, filed in office of register of deeds, which appears of record on the minutes of this meeting of our board, one-third of said bonds to be delivered to said railroad company when said railroad is completed to a point half way between Elkin, N. C., and Wilkesboro, N. C., and the remaining two-thirds to be delivered to said railroad company when the railroad is completed to Wilkesboro, N. C., or the point just opposite said town, as expressed in said agreement.

Now, therefore, in pursuance of the agreement filed, and in accordance with the stipulation therein contained, we do hereby subscribe one hundred thousand dollars to the capital stock of said company, according to the stipulation of said agreement, subject to the will of the qualified voters of Wilkes county; and to ascertain the same of said voters, an election is hereby ordered to be held at the various precincts of Wilkes county, on the 16th day of June, 1887, at which election to be held under the laws and regulations of general county and State elections. Those favoring said subscription shall vote a written or printed ticket with the word "Railroad;" and those opposing, like ticket with the word "No railroad." And the following are appointed registrars and judges of said election in the various townships, and the register of deeds will issue notice to each.

Edwards township.—Wm. Groyn, S. J. Greenwood, L. D. Burcham, T. M. Byrd; J. I. Parks, register.

Trap Hill.—T. H. McCann, John A. Hall, R. B. Bryan, J. C. Lowe; Wesley Joines, register.

Walnut Grove.—J. N. Myers.

Mulberry.—C. N. Hunt, J. O. Owens, W. F. Absher, J. M. Harrold; D. M. Hall, register.

Union.—Thornton Staley, C. F. Vannoy, J. C. Wyatt, James M. Pinkerton; T. C. B. Whittington, register.

Reddie's River.—R. F. Wyatt, Jesse A. McNeill, C. W. Minton, Filmore Foster; H. C. Pennell, register.

Job's Cabin.—G. W. Walsh, John Thompson, Jobe Blackburn, Millard Watson; W. S. Hall, register.

Lewis' Fork.—M. C. Watts, L. E. Davis, J. M. Eller, C. L. Hamby; L. M. McGlamery, register.

Elk.—W. F. Barlow, Joel Triplett, J. T. Hamby, W. T. Land; F. H. West, register.

Beaver Creek.—T. L. Barlow, Thomas Phillips, Jr., James Pennell, Z. T. Ferguson; I. J. Walker, register.

Wilkesboro.—J. C. Hubbard, J. H. Ferguson, Thornton Brown, J. G. Duncan; S. J. Ginnings, register.

Bushy Mount.—J. W. Davis, W. O. Hendren, J. E. Hayes, Wesley Ball; H. Hayes, register.

19 Lovelace.—John Love, Hix Combs, Geo. Hayes, Wilson Moore; B. R. Transoe, register.

Somers.—M. F. Mitchell, John Warren, John Howard, James Combs; D. C. Jarvis, register.

New Castle.—W. W. Hampton, J. P. Wooten, J. T. Martin, William Walker; G. W. Sale, register.

Antioch.—J. C. Le Grand, S. E. Chapel, W. J. Kinyoun, J. E. Martin; Enoch Staley, register.

Fishing Creek.—E. F. Anderson, W. C. Garner, J. A. Glass, Samuel Miller; W. B. Transoe, register.

Rock Creek.—J. F. Parks, R. M. Johnson, J. C. Henderson, D. C. Woodruff; J. W. Felts, register.

Ordered by the board, that the registrars and judges of said election meet at the voting precincts of their respective townships on Saturday before said election and revise the registration books, and make report of the same to the board.

Ordered that the clerk of the board advertise the election of railroad, to be held on the 16th day of June, 1887.

Commissioners' court, June 16, 1897.

Telegram from A. B. Andrews to R. B. Glenn, attorney for Richmond and Danville Railroad Company, as follows:

RALEIGH, *June* 1, 1887.

Received at Winston June 1st.

To R. B. Glenn:

I learn that it has been said by some parties in Wilkes county that the proposition that you made as our attorney, to extend the Northwestern North Carolina railroad, was not binding on us, as it was made by you as attorney. I hereby confirm your action, and the proposition is binding on the company.

A. B. ANDREWS.

Abstract of notes cast at an election held for ratification or rejection for the purpose to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina railroad, held at the different precincts in Wilkes county on the 16th June, 1897, resulted as follows:

Townships.	Registered votes.	Railroad.	No rail-road.	Against subscrip-tion.
Edwards	415	369	1	0
Trap Hill	342	285	0	0
Walnut Grove	222	191	0	0
Rock Creek	226	211	0	0
Mulberry	336	325	0	0
Union	162	109	1	0
Reddie's River	259	246	0	0
Job's Cabin	130	66	5	0
Lewis' Fork	177	114	8	0
Elk	158	3	37	0
Beaver Creek	152	38	7	0
Wilkesboro	338	256	0	1
Bushy Mount	103	97	0	0
Fishing Creek	113	103	0	0
Lovelace	119	90	0	0
Somers	147	109	0	0
New Castle	218	169	0	0
Antioch	123	115	0	0
Total	3,738	2,895	59	1

NORTH CAROLINA, }
Wilkes County. }

The board of county canvassers for said county, having canvassed and judicially determined the original returns of the election in the several precincts in the county, June 16, 1887, on the question of subscribing one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company, I do hereby certify, as chairman of said board, that it appears to be three thousand seven hundred and thirty-eight registered voters of said county, and that two thousand eight hundred and ninety-five votes cast in favor of "Railroad" and fifty-nine votes cast "No railroad," and one vote cast against subscription; and as chairman of said board of canvassers do declare that a majority of the qualified voters having voted in favor of said subscription, that the same has been ratified by the voters of said county.

June 18, 1887.

(Signed) L. D. BURCHAM,
Chm. Board of Co. Canvassers.

STATE OF NORTH CAROLINA, }
Wilkes County. }

Commissioners' Court, July Term, 1887.

Whereas, an election was duly held in Wilkes county on the 16th day of June, 1887, in accordance with an order previously made by the board of county commissioners, for the purpose of submitting to the qualified voters of Wilkes county a proposition to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and whereas, it appearing to us from the returns of the election (held in the county at the time aforesaid), that the majority of the qualified voters of Wilkes county voted in favor of the railroad, which vote was duly canvassed and adjudged carried by the board of county canvassers, and the same properly reported to us. And it appearing to us that a majority of the qualified voters were in favor of said proposition:

Now, therefore, we, the board of county commissioners of Wilkes county, by authority of the power invested in us by law, do hereby subscribe on our books to the capital stock of the Northwestern North Carolina Railroad Company, the sum of one hundred thousand dollars, under the limitations and conditions as contained in the proposition of the company. And do hereby appoint, empower and commission W. H. H. Cowles, of Wilkes county, as our legal and authorized agent and proxy for us, and in our stead, and for the county of Wilkes, to subscribe on the books of the Northwestern North Carolina Railroad Company the said sum of one hundred thousand dollars, to be paid on the condition of the completion of said road, as expressed in the proposition of the railroad company, as hereinafter set forth.

We further order that bonds with coupons in sums not less than one thousand dollars nor more than five thousand dollars, payable not less than ten nor more than forty years after date (the amount of the bonds and the time the are to run to be hereafter agreed upon between us and the railroad company), with interest at six per cent., payable semi-annually (the bonds to be on interest only from time of their delivery), — prepared to be issued and signed by us.

We further order and adjudge Jesse T. Ferguson be appointed as trustee to receive said bonds when issued, and to hold the same in trust, and to deliver one-third of said bonds to the railroad authorities when the railroad is completed and the cars running to a point half way between Elkin, in Surry county, and Wilkesboro, in Wilkes county, and the other two-thirds of the bonds to be delivered when the railroad is completed and the cars running to Wilkesboro or a point just across the river and opposite said town.

And in case of a failure of the Richmond and Danville Railroad Company to complete the Northwestern North Carolina railroad, as heretofore agreed upon between them and the county of Wilkes, then said trustee must surrender up all the bonds in his hands to us to be cancelled.

It is further ordered, that for the purpose of meeting the interest

on said bonds and the principal when it falls due, the county
21 commissioners shall have power each year to levy and collect a sufficient amount of taxes for the purpose required.

It is further ordered, that before the trustee shall deliver one-third of the bonds, the Northwestern North Carolina Railroad Company shall issue to the county of Wilkes thirty-three and one-third thousand dollars' worth of stock in their railroad; and when the other two-thirds of the bonds are delivered, the said railroad company shall issue sixty-six and two-thirds thousand dollars' worth of stock to said county.

RUFUS W. COLVARD,
Chairman Board of Commissioners.
J. A. COOPER,
County Commissioner.
J. S. HOLBROOK,
County Commissioner.

Ordered that the foregoing be entered upon the minutes of Wilkes county, at July term, 1887.

R. W. COLVARD,
Chairman Board of Commissioners.

Commissioners' Court, August 1, 1887.

The foregoing minutes of last meeting read and approved.

R. W. COLVARD,
Chairman Board of Commissioners.
J. A. COOPER,
County Commissioner.
J. S. HOLBROOK,
County Commissioner.

EXHIBIT "B."

Whereas, a petition in accordance with law has been presented us, asking that an election be ordered in the county of Wilkes on the 6th day of November, 1888, for the purpose of submitting to the people the proposition to subscribe one hundred thousand dollars, payable in Wilkes County bonds, to the capital stock of the Northwestern North Carolina railroad, it is now ordered by us, the commissioners of Wilkes county, that an election be held the 6th day of November, 1888, and that a vote be taken at the different precincts in the county of Wilkes as to whether they will subscribe one hundred thousand dollars to the capital stock of the railroad aforesaid. Those favoring said subscription voting a written or printed ticket with the word "Subscription." Those opposed, "No subscription."

It is further ordered, in accordance with the proposition submitted to us by the Northwestern North Carolina Railroad Company for the extension of the Northwestern North Carolina railroad, that in case that a majority of the qualified voters of Wilkes county shall vote for said subscription the commissioners shall issue bonds, pay-

able to the Wachovia National Bank of Winston, N. C., to run not less than ten nor more than forty years (as the commissioners shall deem best); after date said bonds bearing interest at six per cent. per annum, payable semi-annually, said bonds to be placed in the hands of a trustee, to be selected by the commissioners, and one-third of the bonds to be delivered to the railroad authorities when the railroad is constructed and the cars running to a point one-half the distance between the Surry County line and Wilkesboro, in the county of Wilkes. And the remaining sixty-seven thousand dollars on completion of the road and the running of the train to the town of Wilkesboro or a point across the river, within one mile of the court-house; said bonds to be in denominations of one thousand dollars each, interest to be paid on said bonds only from the time of their delivery.

22 It is further ordered, in accordance with the proposition submitted to the commissioners by the Northwestern North Carolina railroad, that the railroad company shall continue work on said road until it shall have been completed, which shall be by the 16th of September, 1890. And upon the failure of the said road to complete their line from Winston to Wilkesboro, as herein provided, then said subscription unearned shall be null and void, and the railroad company shall have no right to demand the unearned bonds issued by the county, but the trustee, in whose hands the bonds are, shall deliver them up to the county commissioners to be cancelled. And the said railroad company shall issue and deliver to the county of Wilkes certificates of stock in the Northwestern North Carolina railroad to the amount of bonds received at the time of the delivery of bonds to said company. The said election shall be held under the same provisions, laws and regulations as in the case of a regular State or county election. The above order is made at the request of the Northwestern North Carolina Railroad Company, and with their full concurrence.

Whereas, the Northwestern North Carolina Railroad Company have presented to the board of county commissioners of Wilkes county a petition signed by the requisite numbers of citizens, asking the board of county commissioners of Wilkes county to subscribe one hundred thousand dollars to the capital stock of the Northwestern North Carolina Railroad Company; and at their regular meeting of said county commissioners of Wilkes county, held at the court-house in Wilkesboro, N. C., on the first Monday in October, 1888, and upon consideration of said petition, it is ordered by the board that one hundred thousand dollars be subscribed to said Northwestern North Carolina Railroad Company, subject, however, to be ratified by the qualified voters of Wilkes county, at an election to be held on the 6th day of November, 1888. And the Northwestern North Carolina Railroad Company, through A. B. Andrews, president of said company, covenants and agrees, to and with the said board of county commissioners of Wilkes county, to wit: R. W. Colvard, chairman; J. A. Cooper and J. S. Holbrook, that in case said Northwestern North Carolina Railroad Company do not comply with the terms of a certain order

made at this court, to wit, that said railroad company agrees to construct and build a railroad from Winston, N. C., to Wilkesboro, N. C., and to have said road in running operation, properly equipped to Wilkesboro, N. C., or to within one mile of the court-house, across the river, by the 16th day of September, 1890; that the said Northwestern North Carolina Railroad Company will forfeit and pay to said commissioners for the use of Wilkes county, the sum of ten thousand dollars, provided that said subscription of one hundred thousand dollars shall be legally voted and subscribed to the capital stock of said railroad company. The ten-thousand-dollars forfeiture is to be placed in the Wachovia national bank, of Winston, N. C., to be held in trust for the use of Wilkes county, N. C., and to be turned over to the said county commissioners of Wilkes county, N. C., in case said Northwestern North Carolina Railroad Company shall fail to complete said railroad, as hereinbefore stated. In case the depot be situated on the east side of Reddie's river, the railroad company obligates themselves to erect at their expense a good, substantial bridge over Reddie's river, for the purpose of transporting teams, wagons, etc., and the said bridge to be built whenever the commissioners designate. The county commissioners obligate themselves to furnish a good public road to and from said bridge
23 to the depot. The said bridge to be turned over to the county and be kept forever afterwards as a public bridge; said bridge to be built within sixty days from the completion of the railroad to the point intended as a depot. It is expressly understood and agreed between the said county commissioners and the said railroad company, that if a majority of the qualified voters of Wilkes county vote for the subscription of one hundred thousand dollars, this day ordered by said commissioners, and this one hundred thousand dollars, as provided for in this election, to be held November 6, 1888, is subscribed by the voters, then the obligations heretofore entered into with the Richmond and Danville Railroad Company shall be null and void, otherwise, it shall remain in full force till the expiration of time specified in the first agreement, made on May 3, 1887, with the Richmond and Danville Railroad Company.

R. W. COLVARD,
Chairman Board of Commissioners.
J. A. COOPER, *County Commissioner.*
J. S. HOLBROOK,
County Commissioner.
NORTHWESTERN N. C. R. R. CO.,
By A. B. ANDREWS, *President.*

Commissioners' Court, October Term, 1888.

The following were appointed judges of the railroad election, to be held the first Tuesday in November, 1888:

Bushy Mount.—B. F. Tedder, Burton Queen.
Lovelace.—R. V. Wright, J. F. Anderson.
Somers.—J. F. Mitchell, W. A. Souther.
New Castle.—John Martin, N. W. Brown.

Antioch.—Stephen Pardew, E. O. Martin.
Fishing Creek.—E. F. Anderson, Clinton Foushee.
Rock Creek.—Thomas Myers, R. M. Johnson.
Edwards.—J. Q. Sparks, L. D. Burcham.
Trap Hill.—J. A. Hall, Monroe Bryan.
Walnut Cove.—Aaron Triplett, W. R. Gambill.
Mulberry.—L. A. Dancy, Harrison Church.
Union.—C. F. Vannoy, J. M. Phipps.
Reddie's River.—J. A. McLean, William E. Bumgarner.
Job's Cabin.—G. W. Walsh, Berry McMillan.
Lewis' Fork.—Francis Eller, W. A. McGlamery.
Beaver Creek.—I. J. Walker, Nathan Horton.
Elk.—J. C. Laud, A. Lippford.
Wilkesboro.—W. A. Foster, J. G. Privette.

NORTH CAROLINA, }
Wilkes County. }

It appearing to the satisfaction of the board of county commissioners of Wilkes county, according to the board of county canvassers, that there are four thousand one hundred and eighty-two qualified voters in Wilkes county, and that at the election ordered by us to be held on the 6th day of November, 1888, to subscribe "one hundred thousand dollars" to the capital stock of the Northwestern North Carolina Railroad Company, two thousand seven hundred and sixty-two votes were cast for said propositions, according to the conditions, stipulation and agreements contained in said proposition; and this being a majority of the qualified voters in Wilkes county:

Now, therefore, it is hereby adjudged by the board that said proposition is properly ratified according to said contracts and agreements heretofore entered into between said railroad company and this board.

APRIL 1, 1889.

Ordered by the board, that the one hundred thousand
24 dollars subscribed to the Northwestern North Carolina Railroad Company at October term, 1888, at the commissioners' court of Wilkes county, and ratified by the voters of Wilkes county at an election ordered by and held November the 6th, 1888, be paid in bonds of the denominations of one thousand dollars each, bearing interest, payable semi-annually, at the Wachovia National Bank of Winston, N. C., from the time of their delivery, as set forth in the agreement, entered into between the commissioners of Wilkes county and A. B. Andrews, president of the Northwestern North Carolina Railroad Company, at October meeting, 1888, the principal of which bonds shall become due and payable as follows, to wit, three thousand dollars thereof shall become due and payable eleven years after their delivery to the said Northwestern North Carolina Railroad Company, and five thousand thereof become due and payable each and every year thereof, till the thirtieth year, there shall be paid the seven thousand dollars still remaining due.

It is further ordered by the board, that R. W. Colvard is hereby authorized and empowered to contract with any company he may deem best, to have properly lithographed the bonds which are to issue, with coupons attached, providing for the payment of said interest semi-annually, as set forth in the contract, made at October term, 1888, of this court.

Commissioners' Court, May 6, 1889.

Ordered, that George H. Brown, cashier of the First National Bank of Statesville, N. C., be appointed trustee, to hold the one hundred thousand dollars of the Wilkes County bonds, subscribed to the Northwestern North Carolina railroad as provided in said order of election, which bonds the said trustee is to hold till an order — signed by the board of county commissioners of Wilkes — to turn over the said bonds to the said railroad authorities.

Commissioners' Court, June 3, 1889.

The Richmond and Danville Railroad Company, through W. W. Barber, demanded that the commissioners of Wilkes county issue bonds to the amount of one hundred thousand dollars, subscribed to the Northwestern North Carolina Railroad Company, and asked that a trustee be appointed, as provided for in the agreement, and the bonds placed in his hands, as therein specified; and if the county commissioners select an individual trustee and place the bonds in his hands, without taking from him a sufficient obligation for the faithful performance of his trust, as per the contract, they do so against the protest of said railroad company.

Ordered, that J. T. Ferguson, of Wilkesboro, be appointed trustee to hold the bonds to the amount of one hundred thousand dollars, subscribed by Wilkes county to the Northwestern North Carolina Railroad Company; and that the said J. T. Ferguson shall file at the next meeting of this board a bond in the sum of one hundred thousand dollars for the forthcoming of the bonds when demanded by the commissioners or when directed to be turned over under the contract, and for the faithful performance of his trust.

JUNE 2, 1890.

Whereas, on the 1st day of October, 1888, the board of commissioners of Wilkes county entered into a contract with the Northwestern North Carolina Railroad Com*m*pany to issue one hundred thousand dollars of county bonds to aid in the construction and extension of said Northwestern North Carolina railroad; and, whereas, the further condition of said contract provides that "one-third" of the bonds are to be delivered to said railroad authorities when the railroad is constructed and the cars running to a point one-
25 half the distance between the Surry County line and Wilkesboro, in the county of Wilkes; and it appearing to us by the affidavit of A. B. Andrews, president of the Northwestern North Carolina Railroad Company, and C. F. Botton, chief engineer of said

company, that the above condition and provision has been complied with, and the board here finding as a fact that the same is true:

It is now ordered by the board of commissioners that thirty-three thousand dollars of bonds, face value, numbered from one to thirty-three (1 to 33), inclusive, be signed and delivered at once to said A. B. Andrews, president of the said Northwestern North Carolina Railroad Company, and take his receipt therefor.

It is understood and agreed here between the parties to the contract, all being present, that the interest on the bonds shall run only from the 1st day of June, 1890, but *if* it is further agreed between the parties that before the delivery of said bonds that the board of commissioners may cut off from the first eleven bonds the coupons due October 1, 1890, leaving the October 1, 1890, coupons on the other twenty-two bonds, which will be the same as if the fractional part of the amount due on all the October coupons, 1890, were paid by the county at maturity.

And it is further ordered by the board of commissioners of Wilkes county, that when said railroad shall be completed to Wilkesboro, or to a point within one mile of the court-house, as stipulated in the agreement, entered into between the board of commissioners of Wilkes county and the Northwestern North Carolina Railroad Company, at the meeting of said board on the 1st day of October, 1888, as aforesaid, and when the proper affidavits shall be filed as to said completion, according to the contract, then the chairman of this board is hereby directed to execute and sign the remaining sixty-seven thousand dollars of bonds, and deliver the same to A. B. Andrews, president of said Northwestern North Carolina Railroad Company, and take his receipt for the same; and to receive from said A. B. Andrews, president, as aforesaid, the certificate of stock for Wilkes county.

It is further ordered by the board, that R. W. Colvard, chairman of this board, is authorized and empowered to agree with A. B. Andrews, president of the Northwestern North Carolina Railroad Company, as to what number of coupons shall be detached in case said bonds are delivered at a time other than when said coupons are due, so that the matter, of equitable, adjusting the interest on said bonds, may be arranged — the county of Wilkes, and said railroad authorities' said interest to run only from said completion of the railroad.

It appearing to the satisfaction of the board of commissioners of Wilkes county, that the contract between said commissioners and A. B. Andrews, president of the Northwestern North Carolina railroad, entered into on the first Monday in October, 1888, as shown by the minutes of said commissioners, having been fully complied with, it is therefore ordered that the president of the Wachovia National Bank of Winston, N. C., turn over to said A. B. Andrews the forfeit bond for ten thousand dollars, in his possession as a forfeiture in case of failure of said A. B. Andrews to comply with said contract.

NORTH CAROLINA, }
Wilkes County. }

I, E. M. Blackburn, register of deeds for Wilkes county, do hereby certify that the foregoing is a true copy of the proceedings of the county commissioners of Wilkes county in reference to the
26 Northwestern North Carolina Railroad Company, from May 3d, 1888, to December 31st, 1890, as appears on record in my office.

This February 14, 1898.

(Signed) E. M. BLACKBURN,
Register of Deeds.

EXHIBIT No. 1.

Six Per Cent. Bond.

(Copy.)

The county of Wilkes, State of North Carolina, is indebted to the bearer in the sum of one thousand dollars lawful money of the United States, payable on the first day of October, 1913, with interest thereon from the first day of October, A. D. 1889, at six per cent. per annum, payable on the first days of April and October in each year, at the Wachovia National Bank of Winston, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable.

This bond is one of a series on one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled "An act to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson factory, Caldwell county," and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose, on the 6th day of November, A. D. 1889; and by an order of the board of commissioners of Wilkes county, made on the first day of April, A. D. 1889. This series of bonds is issued to pay the subscription of one hundred thousand dollars, made to the capital stock of the Northwestern North Carolina Railroad Company by said county of Wilkes.

In witness whereof, the chairman of the board of county commissioners and the clerk of the said board have hereunto subscribed their names, and the said clerk has affixed the seal of said board of commissioners, this 1st day of October, A. D. 1889.

(Signed) R. W. COLVARD,
Ch'm'n Board of Commissioners of Wilkes Co.

(Signed) J. M. ADAMS,
[SEAL.] *Clerk Board Commissioners Wilkes Co.*

Answer.

The defendant, Clarence Call, sheriff of Wilkes county, answering the complaint of the plaintiffs, says:

I. That the allegations of paragraph one of the complaint are true.

II. That the allegations of paragraph two of the complaint are true.

III. That the allegations of paragraph three of the complaint are true.

IV. That the allegations of paragraph four of the complaint are true.

V. That the allegations of paragraph five of the complaint are untrue, as he is advised.

VI. That the allegations of paragraph six of the complaint are untrue, in so far as it is alleged, that after the passage of the laws therein referred to, no county in the State nor the citizens of any county in the State, had any pecuniary interest in said Northwestern North Carolina Railroad Company, but, on the contrary, the county of Forsyth, and the citizens of the county of Forsyth and of other counties in the State, had stock in said Northwestern
27 North Carolina Railroad Company, until the year 1895, when the road was sold to the Southern Railway Company.

VII. That the allegation that the General Assembly of North Carolina, at its session of 1872 and 1873, amended the charter of the Northwestern North Carolina Railroad Company is true, and it may be true, except as hereinafter stated, that no amendment of the charter of said company, prior to February 20th, 1879, granted authority to any county to subscribe stock to said road; but, the allegation that prior to February 20th, 1879, the county of Wilkes had no authority to subscribe stock to said company is, as this defendant is advised, untrue, and it is also untrue that this company had no authority to build a railroad into the county of Wilkes.

VIII. That as to the allegations of article eight of the complaint, the defendant admits that the act of 1879 was passed; and he admits that the ayes and nays on the second reading in the house of representatives do not appear as having been entered on the journal of the house, according to the published volume of the journal, but this defendant has never seen the original journal, and he demands proof of said allegation.

IX. That as to the allegations of paragraph nine of the complaint, the defendant admits that an election was held, but the defendant denies that said election was held without authority, except, that said vote, by an oversight, was taken upon a contract with the Richmond and Danville Railroad Company instead of the Northwestern North Carolina Railroad Company; and said election was, for that reason abandoned, and a new election ordered.

X. That as to the allegations of paragraph ten of the complaint, the defendant admits that the results of the election were abandoned for the reasons set forth in paragraph nine of this answer.

XI. That as to the allegations of paragraph eleven of the complaint, the defendant admits that the election was held, and that a majority of the qualified voters of the county cast their ballots in favor of the subscription of one hundred thousand dollars to the said Northwestern North Carolina Railroad Company, but the defendant cannot say whether Exhibit "B" is a full transcript of the proceedings or not. That the other allegations in said paragraph are untrue, but the defendant avers that the election was legally held; that the board of commissioners were fully authorized, as he is advised, to order said election, and to make the subscription to the road, and to issue the bonds, under the original charter of the road, passed by the convention of North Carolina in March, 1868; and by virtue of authority conferred by sections 1996 and 2000, inclusive, of the Code of North Carolina.

XII. That as to allegations in paragraph twelve of the complaint, it is true that the board of commissioners issued the one hundred thousand dollars of bonds, and have levied a tax annually, to pay the interest on said bonds.

XIII. That it is true that the defendant has some funds on hand, as treasurer, to be applied on coupons that fall due in April and October, 1897, and money is in his hands to be applied in payment of coupons yet to fall due.

XIV. That it is true that said Call has been in the habit of paying said coupons, without any special order of said plaintiff board, but these payments were made by the consent and direction of the plaintiff board, and it was well understood between the said board and this defendant that these coupons should be paid by this defendant whenever he had the funds in hand.

28 That the plaintiff board levied a special tax to pay certain coupons for 1893 and 1894, which long remained unpaid, and certain bondholders, through their agent or agents had many times presented their coupons for payment, and this defendant did agree with said agent or agents to notify them when he should be in funds to pay the same; and this defendant did so notify said agent or agents, as soon as he came into possession of sufficient funds, to pay off these coupons, amounting to two thousand one hundred dollars, and this defendant did so pay them off. That this defendant has made no payments of coupons since this restraining order was served on him.

And for further defence, the defendant says:

I. That the Northwestern North Carolina Railroad Company was chartered by an ordinance of the constitutional convention of North Carolina; that said ordinance was ratified the 9th day of March, 1868, and was published as chapter 17 of the ordinances of said convention, and a copy of said ordinance is hereto attached and marked Exhibit "A." That section two of said ordinance reads as follows: "Be it further ordained, that the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred dollars each." That section twelve of said ordinance reads as follows: "Be it further ordained, that the stockholders of said company may pay the stock subscribed

to them, either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties and towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic (Atlantic and North Carolina) Railroad Company for the government of such towns and counties as now allowed to subscribe to the capital stock of said company." That section thirteen of said ordinance reads as follows: "Be it further ordained, that the company shall have power to construct branches of said railroad, one of which shall run from said towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia." That the provisions setting forth the manner in which the towns and counties shall subscribe to the stock of the Atlantic and North Carolina Railroad Company, are contained in sections 33 to 37, inclusive, of chapter 136 of the Laws of the General Assembly, Session of 1852, a copy of which sections is hereto attached and marked Exhibit "B."

II. That by virtue of said ordinance, the Northwestern North Carolina Railroad Company was organized on April 17, 1868. That in April, 1868, the county of Forsyth, by virtue of the provisions of said ordinance, voted a subscription of one hundred thousand dollars to said railroad company, and said county issued bonds in payment of said subscriptions, the validity of which bonds has been upheld by the supreme court of North Carolina in the cases of Hill *v.* Commissioners of Forsyth County, 67th N. C., page 367, and of Belo *v.* Commissioners of Forsyth County, 76 N. C., 489.

III. That the work of grading the road-bed of said railroad began under the supervision of Edward Belo, now dead, the president of said railroad company in the month of October, 1868, and continued all through the winter of 1868 and 1869; and by April 10th, 1869, considerable grading had been done on said railroad, seventy-five to one hundred and fifty hands having been employed during the winter on said work: and this defendant is advised that the Northwestern North Carolina railroad was an unfinished road on said 10th day of April, 1869 (1869).

29 IV. That the county of Forsyth had stock in said railroad company to the extent of seventy-five thousand dollars, and many citizens of the county of Forsyth, Guilford and other counties in the State held stock in said company, from or soon after the organization of the company in 1868 to the year 1895.

V. That sections 1996 to 2000, inclusive, of the Code were first enacted on the 10th day of April, 1869, and were intended, as set forth in the title to the act, "to authorize the several counties of the State to take stock in railroad companies," the act being published as chapter 171 of the Laws of 1868 and 1869. That this act was brought forward in Battle's Revisal as sections 66 to 70, inclusive, of chapter 99, and was also brought forward in the Code of North Carolina, ratified as one act, on March 2d, 1883.

VI. That this defendant is advised that the bonds of one hundred thousand dollars, issued by the board of commissioners of Wilkes

county, as aforesaid, were legally issued and were authorized by the provisions of the original charter, granted by the convention on March 9th, 1868, before the ratification of the present constitution, and that the power being given by said ordinance of said convention, the method of making said subscription is pointed out in sections 1996 to 2000, inclusive of the Code, the board of commissioners of said county of Wilkes being the successors in office of the board of justices and of the county court, existing before the adoption of the constitution in 1868.

That the election held on November 6th, 1888, was held in accordance with the provisions of the sections 1996 to 2000, inclusive, of the Code of North Carolina. That the defendant is informed that none of the bonds of the county of Wilkes, issued in aid of the completion of said Northwestern North Carolina railroad, are now held by said railroad company, but all of them are held by *bona fide* holders for value; and this defendant is advised that any irregularities in the method of holding said election, if any such did exist, would not in any way affect the validity of said bonds in the hands of *bona fide* purchasers for value.

VII. That the defendant is further advised that said board of commissioners was authorized to issue said bonds by virtue of the provisions of sections 1996 to 2000, inclusive, of the Code of North Carolina, which sections were first enacted on April 10, 1869. That the Northwestern North Carolina railroad was an unfinished or incomplete road on April 10, 1869, was such an unfinished and incomplete road on January 1, 1874, when the provisions in Battle's Revisal took effect; and was such an unfinished and incomplete road on November 1, 1883, the date on which the provisions of the Code of North Carolina took effect.

VIII. That the construction of the Northwestern North Carolina railroad from Greensboro, N. C., to Winston and Salem, N. C., was finished about the year 1872, and has since been operated as a railroad line, and freight and passenger trains have been run over the line of the same between Greensboro and Winston and Salem, a distance of some twenty-nine miles. That in 1887 the work of constructing the road and of grading the road-bed between Winston and Wilkesboro, in Wilkes county, was begun, and the said work of grading the said road-bed was continued until the work was completed, in the year 1890. That on the 6th day of November, 1888, the said railroad between the towns of Winston and Wilkesboro was an unfinished railroad, the work of constructing the said railroad between said towns having not been finished, but the same being in an unfinished condition, many miles of the line between Winston and Wilkesboro being then unfinished.

30 IX. That the General Assembly of North Carolina, at its session in the year 1881, passed an act, which is published as chapter — of said laws, which authorizes the said Northwestern North Carolina Railroad Company to extend its road and to build branches; and said act provided for subscriptions by counties, cities and towns and townships, a copy of which act is hereto attached and marked Exhibit "C."

X. That the General Assembly of North Carolina, at its special session in 1868, passed an act ratifying the charter of the said railroad, published as act — of said acts, a copy of which is hereto attached and marked Exhibit "D," which is specially pleaded by this defendant.

Wherefore, the defendant prays that the restraining order heretofore granted be dissolved; that this action be dismissed, and the defendant recover the costs, and for such other and further relief as he may be entitled to.

(Signed) CLARENCE CALL,
Sheriff and Treasurer.

Clarence Call, being duly sworn, says: That the contents of this answer are true of his own knowledge, except as to matters stated on information and belief, and these he believes to be true.

(Signed) CLARENCE CALL.

Sworn to and subscribed before me, this January 28th, 1898.

(Signed) H. R. STARBUCK,
Judge Superior Court.

EXHIBIT "A."

CHAPTER XVII.

An ordinance to incorporate the North Carolina Railroad Company.

SECTION 1. Be it ordained by the people of North Carolina in convention assembled, and it is hereby ordained by authority of the same: That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the State, to be hereafter determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic, for the space of ninety-nine years, and by that name may sue and be sued, plead and be impleaded, in any court of law and equity in the State of North Carolina; and may have and use a common seal, and shall be capable in law and equity of purchasing, holding, leasing and conveying estates, real and personal, and mixed, and acquiring the same by gift or devise, so far as may be necessary for the objects herein contemplated, and no further; and said company may enjoy all other rights and immunities which other corporate bodies may lawfully exercise, and may make all necessary by-laws and regulations for its government not inconsistent with the constitution and laws of the State of North Carolina and of the United States.

31 SEC. 2. Be it further ordained, That the capital stock of said company may be created by subscriptions on the part

of individuals, corporations and counties, in shares of one hundred dollars.

SEC. 3. Be it further ordained, That books of subscription to the capital stock of said company shall be opened by the following commissioners, to wit: I. G. Lash, J. A. Vogler, H. W. Fries, in the town of Salem; and Thomas J. Wilson, Joseph Masten, R. A. Wilson, in the town of Winston, and by such other persons and in such other places as the aforesaid commissioners may direct; and that ten days' notice of the opening of said books shall be given in one or more newspapers of this State; and, furthermore, that the said commissioners, or any four of them, may, at any time after said books have been kept open for the space of thirty days, and the sum of thirty thousand dollars has been subscribed to the capital stock of said company and five per cent. paid thereon, have power to call together the subscribers to said stock for the purpose of completing the organization of said company; and the said subscribers shall be and are hereby declared incorporated into a company by the name and style of the Northwestern North Carolina Railroad Company; and the said company may, from time to time, receive other subscriptions to its capital stock as it may deem proper.

SEC. 4. Be it further ordained, That the company may hold annual meetings of its stockholders, and oftener if necessary, and at its organization and the annual meetings subsequent thereto, ten directors shall be elected to hold office for one year, or until their successors shall be elected; and any of said meetings shall have power to make or alter the by-laws of the company: Provided, that in all such meetings of the stockholders a majority of all the stock subscribed shall be represented in person or by proxy, which proxy shall be verified in the manner prescribed by the by-laws of the company; and each share thus represented shall be entitled to one vote on all questions; and that it shall be the duty of the directors of the company to elect one of their own number as president of said company, and to fill all vacancies in their board.

SEC. 5. Be it further ordained, That after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of five miles each, to the towns of Winston and Salem, in Forsyth county, which portion of said railroad, when completed, shall constitute its first division: Provided, that if the distance from the nearest section to the towns of Salem and Winston be less than five miles, the same shall be considered a section.

SEC. 6. Be it further ordained, That said company shall have the same power to call for and enforce the payment of stock subscribed, as was heretofore granted to the North Carolina Railroad Company, by their charter of incorporation; and shall have power to condemn land for the use of the company, when a contract of purchase cannot be made with the owner thereof, to the same extent and in the same manner and under the same rules, regulations and restrictions as

the said North Carolina Railroad Company were authorized to do by ther act of incorporation.,

SEC. 7. Be it further ordained, That all contracts made and entered into by the president or superintendent of the company, whether with or without seal, shall be binding upon the company; and the president shall, under the instruction of the board of
32 directors, issue certificates of stock to the stockholders, which shall be transferable in the manner prescribed by the by-laws of the company.

SEC. 8. Be it further ordained, That whenever the president and chief engineer of said company shall certify to the governor of the State that the grading of any of the sections of said road, as mentioned in section 5 of this ordinance, is completed and ready for the superstructure, he shall direct the public treasurer of the State to loan in behalf of the State to the said company the sum of fifty thousand dollars in coupon bonds; and in like manner the governor will direct similar loans to be made to the company, upon the completion of the grading of each and every section, until the first division is graded entire; and said company shall set aside the receipts of the road over and above its annual expenses, as a sinking fund to pay the said debts and interest, the whole amount of said debt and interest to be paid before the said company shall order any dividends on the stock of the company; and that said sinking fund so produced shall be semi-annually paid into the public treasury.

SEC. 9. Be it further ordained, That no part of said loan or bonds shall be delivered to said company until the president and directors thereof shall execute and deliver to the governor of the State a mortgage on the entire road and its property, conditioned to save the State harmless against the loss of both principal and interest of said loan.

SEC. 10. Be it further ordained, That the coupon bonds loaned, as aforesaid, shall be signed by the governor, countersigned by the treasurer and sealed with "the great seal of the State," bearing six per cent. interest, the principal payable at the end of thirty years from the date thereof, and the coupons for the interest payable semi-annually in such form as the public treasurer may direct.

SEC. 11. Be it further ordained, That the company may have the exclusive right of transporting persons and freight upon said road at such rates of charges as the board of directors may fix, and may have power to farm or lease the same to any person or persons or corporation.

SEC. 12. Be it further ordained, That the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribers to the capital stock of said company.

SEC. 13. Be it further ordained, That the company shall have power to construct branches of said road, one of which shall run from said towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the State of Virginia.

SEC. 14. Be it further ordained, That this ordinance shall be in force from and after its passage.

Ratified this 9th day of March, A. D. 1868.

CALVIN J. COWLES, *President.*

T. A. BYRNES, *Secretary.*

33 EXHIBIT "B."

Chapter 136 of the Laws of North Carolina, Session 1852.

SEC. 33. Be it further enacted, That it shall be lawful for any incorporated town or county near or through which said railroad may pass to subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided.

SEC. 34. Be it further enacted, That the corporate authorities of such town, of the justices of the peace of such county, a majority of the justices of the county concurring, to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for members of the house of commons of the General Assembly, whether the officers of said town and the justices of the peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter, to be held for such county and it shall be the duty of the sheriff to notify each justice of said county to attend at the court-house, to which he may make his returns of said poll.

SEC. 35. Be it further enacted, That if upon the return of such constable and of such sheriff, it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county voting upon the question are in favor of the subscription, the corporate authorities of such town and the justices of such county shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county, and on such time as shall be agreed on by said town officers and the justices of such county.

SEC. 36. Be it further enacted, That for the purpose of paying the quotas on said stock, as may be called for or the installments of such subscriptions as may fall due, the town authorities and the justices of the county shall have power to appoint an agent or agents to negotiate a loan or loans for and in the name of such

town and county; and it shall be the duty of the authorities of such town and the justices of such county to levy such taxes annually on the persons, lands and other personal property within such town and county as may be sufficient to pay the amount of such loan or loans and the interest thereon, and as said town authorities and the justices of such county shall deem necessary and proper, and to make such order or orders as shall be deemed necessary for the due collection and payment of the same; and the stock subscribed on behalf of such town and county shall stand pledged for the payment of the loan thus authorized to be contracted.

SEC. 37. Be it further enacted, That the right to the stock in the company hereby authorized to be subscribed, shall vest in the town and county making such subscriptions; and the corporate authorities of said town and the justices of such county shall have power from time to time to appoint a proxy to represent the stock in the meeting of the stockholders of the company, and also an agent to collect the dividends of such stock, and when collected, to apply the same to the payment of the bonds and interest negotiated as aforesaid.

34 EXHIBIT "C."

An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

The General Assembly of North Carolina do enact:

SECTION 1. That it shall be lawful for the Northwestern North Carolina Railroad Company to extend and construct its line of road, or a branch thereof, to commence at or near Winston, in the county of Forsyth, through the counties of Forsyth, Davidson, Yadkin, Davie, Rowan and Iredell, or any or either of them, to Statesville, or some other point on the Western North Carolina railroad, and may build and operate additional branches thereto, or from its present main line to any important mines or manufactories in any of said counties, or counties adjacent to them: Provided, that nothing contained in this act shall operate to be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee and Ohio railroad in Iredell county; but said company is hereby authorized to build said road under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line composing the North Carolina extension.

SEC. 2. That to provide the means in whole or in part for this purpose, the said company may receive subscriptions in money, labor, property or otherwise, as the said company may agree, and may mortgage or otherwise pledge its property and franchises and the work constructed, or to be constructed, with the franchises and rights connected therewith.

SEC. 3. That any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose, or other-

wise contribute to such work in such manner and in such amount as shall be determined by the proper authorities of such corporation, county, city, town or township, and agreed on with the said Northwestern North Carolina Railroad Company.

SEC. 4. This act shall be in force from and after its ratification.

In the General Assembly, read three times, and ratified this the 2d day of March, A. D. 1881.

EXHIBIT "D"

An act ratifying and confirming the charter of the Northwestern North Carolina Railroad Company.

SECTION 1. The General Assembly of North Carolina do enact, that an ordinance, entitled "An ordinance to incorporate the Northwestern North Carolina Railroad Company," ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified and confirmed, and all acts and things heretofore done under the provisions of the said ordinance are hereby ratified and confirmed.

SEC. 2. That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance, incorporating the Northwestern North Carolina Railroad Company, on the justices of the peace of Forsyth county, or of the county court of said county, be and the same are hereby conferred on the commissioners of said county.

SEC. 3. That the commissioners of the county of Forsyth
35 are hereby invested with full powers and authority to levy from time to time such tax as may be sufficient to pay the subscription made by said county to the capital stock of the Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock.

Ratified the 11th day of August, A. D. 1868.

Replication.

Replying to the new matter set up in defendant's answer, the plaintiff says:

1. The plaintiffs admit that the Northwestern North Carolina Railroad Company was chartered by an ordinance of the constitutional convention of 1868, which is published as chapter XVII of the ordinances, passed by said convention, and that the sections of the charter of the Atlantic and North Carolina Railroad Company, referred to in section 12 of said ordinance, are those mentioned in the answer.

2. That plaintiffs have no knowledge, information or belief as to whether the company was organized as alleged, or whether the county of Forsyth voted a subscription as alleged in section 2 of said new matter, and are advised that the validity of the bonds in controversy in this action is in no way dependent on the validity of any bonds that may have been issued in payment of said sub-

scription, if any such were issued, as to which plaintiffs have no information on which to form knowledge or belief, and demand for strict proof.

3. Plaintiffs have no knowledge, information or belief as to whether any work was done on the present line of the Northwestern North Carolina railroad, lying between Greensboro and Winston, prior to the 10th of April, 1869, but deny that any grading had been done prior to said date west of the original terminus of the division of Winston prior to said date, and aver that the portion of the line of said railroad lying between Winston and Wilkesboro, in Wilkes county, N. C., is a new branch of said railway company, constructed under the requirement of the act referred to in the pleading, as ratified on the 20th day of February, 1879; and that said branch was not on the 10th day of April, 1869, or prior thereto, a part of an unfinished line.

4. That plaintiffs have no knowledge, information or belief as to whether the counties of Forsyth, Guilford or other counties in the State held stock as alleged in fourth section of said new matter; and the plaintiffs aver that the citizens of the county of Wilkes had no pecuniary interest, nor any other interest except such as they had in common with all citizens of North Carolina in the Northwestern North Carolina Railroad Company on the 10th day of April, 1869, or at any time prior thereto, until after the 6th day of November, 1888. And that they had had no pecuniary interest in said company or its road up to the time this action was brought, except such as purported to have arisen out of an exchange of the bonds of Wilkes county for those shares of stock in said company.

5. That plaintiffs admit that sections 1996 to 2000, inclusive, of the Code, are in terms the same as chapter 171 of the Laws of 1868–1869, but deny that the bringing forward of said act in the compilation known as Battle's Revisal, had any effect, in contemplation of law, the said revisal never having been lawfully enacted as a statute, nor as to the time when said company was organized, and demand strict proof.

6. In reply to section 6, contained in the new matter of defendant's answer, plaintiffs deny all allegations contained in said section, except that allegation that the bonds are not held
36 by said railroad company, but by *bona fide* holders, for value, as to which plaintiffs have no knowledge or sufficient information to form a belief, and therefore deny, except a legal proposition therein stated, and predicated upon said last-named allegation of fact, and plaintiffs are advised that they are not required to swear to any proposition of law.

7. Replying to the seventh section of the new matter contained in defendant's answer, plaintiffs deny that the board of commissioners of Wilkes county had at the time of issuing the one hundred thousand dollars of bonds in controversy, any authority in law to issue the same or deliver them as a binding contract on the county of Wilkes. Plaintiffs deny that the Northwestern North Carolina railroad, located between Winston and Wilkesboro, was an unfinished or incomplete road on the 6th day of November, 1888, or at

any time prior thereto, and plaintiffs are advised that no section of the compilation known as Battle's Revisal ever had the force and effect of a statute.

8. That plaintiffs have no knowledge or information or belief as to the time when the portion of said railroad located between Greensboro and Winston, was completed or begun to be operated. Plaintiffs have no knowledge or information sufficient to form a belief as to the allegation that the work of grading and constructing the road-bed from Winston to Wilkesboro — in 1887, but admits that some grading had been done between Winston and Wilkesboro before the end of the year 1887. But denies the conclusion of law that the portion of said railroad lying between Winston and Wilkesboro was an unfinished and incomplete road on November 6th, 1888.

9. It is not true that section 3, chapter 162 of the Laws of 1881, purports to enact, " that any corporation, county, city, town or township interested therein, may subscribe to stock for said purpose (of extending said line of the railroad), or otherwise contribute to such work in such manner as shall be determined by the proper authorities of such corporation, county, city or town or township, and agreed on with the said Northwestern North Carolina Railroad Company. But the said act failed to pass on its third reading in the house of representatives, as appears from a certified copy of the journal of said house, which will be offered in evidence.

Further replying to the new matter in section 14 of the defendant's answer, the plaintiffs say that they are informed and believe that the defendant made payment of interest and took up coupons on the bonds in controversy after the service of summons on him in this action, and plaintiffs aver, according to their information and belief, the defendant, when said payment was made, had information that it was the purpose of the plaintiffs to apply to the courts for an order restraining him from making further payments of the interest on said bonds.

(Signed) A. C. AVERY,
(Signed) FINLEY & GREEN,
(Signed) T. J. DULA,
Attorneys for Plaintiff.

C. C. Wright, one of the plaintiffs above named, maketh oath that the facts set forth in the foregoing reply, as of his own knowledge, are true, and those stated on information and belief, he believes to be true.

(Signed) C. C. WRIGHT.

Sworn to and subscribed before me, this the 29th day of January, 1898.

(Signed) H. R. STARBUCK,
Judge Superior Court.

HOUSE OF REPRESENTATIVES,
TUESDAY, *January* 14*th*, 1879.

By Mr. York, a bill to amend the charter of the Northwestern North Carolina Railroad Company for the construction of a second division from Winston and Salem, Forsyth county, up the Yadkin River valley by Wilkesboro to Patterson, Caldwell county.

Referred to the committee on railroads, post-roads, etc.

HOUSE OF REPRESENTATIVES,
SATURDAY, *January* 18*th*, 1879.

Mr. Vaughan, from the committee on railroads, post-roads, etc., reports on H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a second division from the towns of Salem and Winston, Forsyth county, up the valley of the Yadkin river, by Wilkesboro to Patterson, Caldwell county, recommending its passage, with the adoption of an accompanying amendment.

HOUSE OF REPRESENTATIVES,
MONDAY, *January* 20*th*, 1879.

On motion of Mr. York:

H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, W. C. R. R., for the construction of a second division from Winston, Forsyth county, up the Yadkin valley by Wilkesboro to Patterson, in Caldwell county, is taken up for consideration.

The question is on the amendment suggested by the committee, and it is adopted; and as amended, the bill passes its second reading; and then, on motion of Mr. York, is referred to the committee on internal improvements, with order to be printed, and it is so ordered by the house.

HOUSE OF REPRESENTATIVES,
THURSDAY, *January* 30*th*, 1879.

Mr. York, on the part of the committee on internal improvements, submits the following reports on ——; and,

H. B. 103, a bill to amend the charter of the Northwestern North Carolina railroad, etc., recommending its passage with amendments proposed.

HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 1, 1879.

H. B. 103, an act to amend the charter of the Northwestern North Carolina railroad, etc., is taken up on its third reading.

Mr. York submits a new section, to be added to the bill by way of amendment, which is accepted.

Mr. Richardson submits the following amendments, which is accepted:

"Provided, that nothing in this charter shall be construed to exempt said road from taxation."

Mr. Carter of Buncombe, submits an amendment, which, after discussion, is withdrawn.

The question is then put on the amendments offered by the committee and they are accepted; and the question recurs on the passage of the bill.

Mr. Powers sends forward the following amendment:

Amend by inserting in the proper place, "Provided, however, that any county, township, or other corporate authorities who shall issue any bonds or assume any obligations in behalf of this road shall be required to commence as soon as said obligations are
38 assumed, to provide a sinking fund that shall be sufficient to liquidate said bonds or obligations at maturity."

Mr. Christmas sends forward the following amendment:

"Strike out in line 6 the words 'a person' and insert 'two persons in the eastern part of the State and one in the western part;' and insert in line 17 between the words 'toll' and 'who are not in any respect interested in said work.'"

The question is put on the amendment, and it is rejected.

Mr. Turner sends the following amendment:

Strike out "convict and convict labor wherever it occurs in the bill."

The question is put on this amendment and it is rejected; and the question recurs on the passage of the bill; and it passes by the following vote, and is ordered to be engrossed and transmitted to the senate:

Ayes—Messrs. Amis, Anderson, Angier, Ardrey, Armstrong, Bateman, Burhod, Bingham, Bizzell, Blocker, Bonner, Bost, Brown of Yadkin, Brison, Buchan, Cale, Carter of Buncombe, Carter of Yancey, Carrol, Carson, Clark, Colwell, Council, Covington, Davis of Haywood, Deans, Dickson, Dunn, Ellison, English, Etheridge, Ferrell, Foard, Foster, Fulcher, Goldston, Grant, Harrill, Harrison, Hewett, Hines, Holt, Jones, Johnson of Davie, Lamb, Leatherwood, Lockhart, Lowrie, Lutterlow, Meares, Miller, McLean, Normant, Oliver, Orchard, Packston, Pettipher, Powers, Rawley, Reed of Macon, Richardson of Columbus, Robertson, Smith, Taylor, Turner, Venable, Wheeler, Wimberly, York, Young—total, ayes 72.

Nays—Carter of Warren, Christmas, Henderson, Horton, Osborne, Wynne—nays, 6.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February 20th*, 1879.

The committee on enrolled bills reports as correctly enrolled:

An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a second division from the towns of Winston and Salem, Forsyth county, up to the Yadkin valley to and by Wilkesboro, Patterson's factory, Caldwell county.

SENATE CHAMBER, *February 4th*, 1879.

A message was received from the House, ——, transmitting for concurrence:

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a

division from the towns of Salem and Winston, up the Yadkin valley by Wilkesboro, to Patterson's factory, in Caldwell county.

Referred to the committee on internal improvements.

SENATE CHAMBER, *February 11th*, 1879.

From the committee on internal improvements:

By Mr. Brower, H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad, for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, Caldwell county, recommending it do pass.

Calendar.

On motion of Mr. Nicholson, H. B. No. 103, S. B. 378, bill
39 to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, in Caldwell county, was taken up on its second reading as passed—ayes 33, noes 5, as follows:

Those voting in the affirmative were:

Messrs. Alston, Black, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Caldwell, Dancey, Davidson, Dortch, Eppes, Graham of Lincoln, Graham of Montgomery, Harriss, Henderson, Holleman, Hoyle, Leach, Lyon, Matheson, Merritt, Mitchell, Moye, Nicholson, Ormand, Redwine, Ross, Scales, Stuart, Taylor, Wardell, Ward—33.

Those voting in the negative were:

Messrs. Alexander, Austin, King, Mebane, Williamson—5.

SENATE CHAMBER, *February 12th*, 1879.

H. B. No. 103, S. B. No. 378, bill to amend the charter of the Northwestern North Carolina railroad for the construction of a second division, for the towns of Winston and Salem, in Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, in Caldwell county, passed its third reading—ayes 35, noes 1, as follows:

Those voting in the affirmative were:

Messrs. Alston, Bledsoe, Brower, Bryan of Duplin, Bryan of Pender, Bull, Bynum, Caldwell, Dancey, Dortch, Eaves, Eppes, Erwin, Everett, Graham of Lincoln, Harris, Henderson, Holleman, Hoyle, King, Leach, Lyon, Matherson, Mitchell, Nicholson, Ormand, Redwine, Respass, Rose, Scales, Stuart, Taylor, Waddell, Waldo, Ward—35.

Mr. Williamson voted in the negative.

SENATE CHAMBER, *February 20th*, 1879.

The committee on enrolled bills reported as correctly enrolled:

H. B. 103, S. B. 378, an act to amend the charter of the Northwestern North Carolina railroad and for the construction of a second division from the towns of Salem and Winston, Forsyth county, up the Yadkin valley by Wilkesboro, to Patterson's factory, Caldwell county.

SENATE CHAMBER, *January 21st*, 1881.

Bills and resolutions were introduced, read the first time and disposed of as follows:

By Mr. Tucker, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its railroad and to build branches thereof.

Referred to the committee on internal improvements.

SENATE JOURNAL, *January 25th*, 1881.

From the committee on internal improvements:

By Mr. York, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and to build branches thereof, recommending it do pass.

Calendar.

SENATE JOURNAL, *January 29th*, 1881.

Bills and resolutions upon the calendar were taken up and disposed of as follows:

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and to build branches thereof.

40 On its second reading, Mr. Scott of New Hanover moves the bill be postponed until Thursday next. Lost.

Bill then passed its second reading—ayes 26, noes—as follows:

Those voting in the affirmative were:

Messrs. Bernard, Burwell, Carr, Cunningham, Davidson, Dever, Dickey, Dortch, Eaves, Finger, Hanes, Hooper, Jenkins, Jones, King, Lockhart, Mebane, Newland, Oats, Pridgen, Richardson, Scott of New Hanover, Shears, Staples, Tucker, York—26.

The calendar.

SENATE CHAMBER, *February 5th*, 1881.

S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and to build branches thereof on its third reading.

Mr. Glenn moves to amend:

Add to the first section the following: "Provided that nothing contained in this act shall operate or be construed so as to prevent or interfere with the construction of the North Carolina extension of the Virginia Midland railroad from Danville, Virginia, via Winston, Forsyth county, and Mocksville, Davie county, to some point on the Atlantic, Tennessee and Ohio railroad, in Iredell county; but said company is hereby authorized to build said railroad under the organization and consolidation heretofore made by the stockholders and directors of the consolidated line, comprising the North Carolina extension."

Mr. Tucker moves to amend the amendment:

"Strike out all after the words 'Iredell county" in line 12." Lost.

Mr. Glenn's amendment was adopted.

Bill then passed its third reading, ayes 34, as follows:

Messrs. Battle, Blue, Burwell, Carr, Davidson, Dickey, Dortch, Faison, Finger, Foil, Glenn, Gudger, Hampton, Hanes, Harper, Harris, Jenkins, Jones, Manning, Mebane, Merritt, Newsom, Oats, Parish, Richardson, Scott of New Hanover, Scott of Rockingham, Spears, Spruill, Stowe, Tucker, Whitaker, Williamson of Davie and Wynne—34.

SENATE CHAMBER, *February* 11*th*, 1881.

From the committee on engrossed bills:

By Mr. Spears, S. B. 224, bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

SENATE CHAMBER, *March* 2, 1881.

From the committee on enrolled bills:

S. B. 224, H. B. 634, an act to authorize the Northwestern North Carolina Railroad Company to extend its road and build branches thereof.

HOUSE OF REPRESENTATIVES,
FRIDAY, *February* 11*th*, 1881.

A message from the senate is announced, transmitting S. B. 224, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereof.

S. B. 224 is referred to the committee on corporations.

41 HOUSE OF REPRESENTATIVES,
SATURDAY, *February* 12*th*, 1881.

Reports of Committees.

—— favorably on ——; and, S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
MONDAY, *February* 21*st*, 1881.

S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereto.

HOUSE OF REPRESENTATIVES,
TUESDAY, *February* 22, 1881.

The morning hour having expired, on motion of Mr. Carter, the vote by which S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches thereof, is reconsidered; and the bill is placed on the calendar.

HOUSE OF REPRESENTATIVES,
THURSDAY, *February* 24*th*, 1881.

The calendar is taken up, and,

S. B. 224, H. B. 634, a bill to authorize the Northwestern North Carolina railroad to extend its road and build branches, is put on its third reading.

Mr. Carter offers the following amendment:

Amend by adding to section 3 the following words: "Provided, that nothing in this act contained shall be construed to authorize or empower the Western North Carolina Railroad Company to lend its credit, or otherwise in any manner contribute to the work or any part thereof contemplated in this act."

The amendment is adopted; and as amended, the bill passes its third reading, and is ordered to be sent to the senate with engrossed amendments.

HOUSE OF REPRESENTATIVES,
WEDNESDAY, *March 2d*, 1881.

Mr. Green of Orange, from the committee on enrolled bills, reports the following bill to have been correctly enrolled: An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof.

Certificate of Secretary of State, North Carolina.

DEPARTMENT OF STATE,
RALEIGH, N. C., *January 15th*, 1897.

I, Cyrus Thompson, secretary of state, do hereby certify that the foregoing and annexed nine sheets contain a full and accurate transcript of the Journals of the Senate and House of Representatives of the State of North Carolina, for the Session of the General Assembly in the Year 1879, of so much of said journal as relates to H. B. 103, S. B. 378, a bill to be entitled An act to amend the charter of the Northwestern North Carolina railroad, and for the construction of a second division from the towns of Winston and Salem, Forsyth county, up the Yadkin valley by Wilkesboro to Patterson's factory, Caldwell county, the title, as published, of chapter 43, Public Laws of the Session of 1879; and of so much of the Journals of the Senate and House of Representatives of the State of North Carolina, for the Session of the General Assembly in the Year 1881, as relates
42 to S. B. 224, H. B. 634, a bill to be entitled An act to authorize the Northwestern North Carolina Railroad Company to extend its road and to build branches thereof, the title, as published, of chapter 162 of Public Laws of the Session of 1881.

Done in office at Raleigh, this the 15th day of January, A. D. 1897.

[SEAL.] CYRUS THOMPSON,
Secretary of State.

Affidavits of G. W. Hinshaw.

G. W. Hinshaw, being duly sworn, deposes and says that he is now, and was, in the spring of 1868, a resident of the town of Winston, Forsyth county, N. C. That in the spring of 1868 the county of Forsyth voted a subscription of one hundred thousand dollars to the Northwestern North Carolina Railroad Company. That thereafter and before the 6th day of November, 1888, the county of Forsyth became the owner of seventy-five thousand dollars of stock

in said Northwestern North Carolina Railroad Company; and prior to said day in November, 1888, citizens of the county of Forsyth and of other counties in the State of North Carolina, became owners of stock in the said Northwestern North Carolina Railroad Company, and that said county of Forsyth and said citizens were owners of said stock on said 6th day of November, 1888, and remained owners of said stock until the year 1895. That he is acquainted with the issuing of the bonds of Wilkes county in aid of the completion of the Northwestern North Carolina railroad; that none of the bonds are now held or owned by the Northwestern North Carolina Railroad Company, but the same were sold for value by the said railroad company before the year 1893. That the construction of the Northwestern North Carolina railroad from Greensboro, N. C., to Winston and Salem, N. C., was finished about the year 1873, and the line has since been and is now operated as a railroad line, freight and passenger trains having been run over the line of the same between Greensboro, N. C., and Winston and Salem, N. C., a distance of some twenty-nine miles. That in the year 1887, the work of constructing the road and of grading the road-bed between Winston, in Forsyth county, and Wilkesboro, in Wilkes county, was begun; and the work of grading said road-bed was continued until the work was completed, to or near Wilkesboro, in the year 1890. That on the 6th day of November, 1888, the said Northwestern North Carolina railroad, between the towns of Winston and Wilkesboro, was an unfinished and incomplete railroad, the work of constructing the said railroad between the said towns having not been finished on said day in November, but the same being in an unfinished condition on said day, many miles of the line between said towns of Winston and Wilkesboro being ungraded and unfinished.

(Signed) G. W. HINSHAW.

Sworn and subscribed before me, this the 27th day of January, 1898.

N. S. WILSON,
Clerk Superior Court,
By SAM F. VANCE, *D. C.*

G. W. Hinshaw, being duly sworn, says that he was acquainted with the vote of the people of Wilkes county, referred to as Exhibit "A" in the suit and attached to the complaint of plaintiff. That the vote was taken, based upon a contract with the Richmond and Danville Railroad Company instead of upon a contract with the Northwestern North Carolina Railroad Company, and the same was abandoned for that reason and another vote taken in November, 1888.

(Signed) G. W. HINSHAW.

43 Sworn to and subscribed before me, this 28th day of January, 1898.

(Signed) H. R. STARBUCK,
Judge Superior Court.

Certificate of Stock.

Northwestern North Carolina Railroad Company, No. 159; three hundred and thirty shares. Capital stock, two million dollars. Shares one hundred dollars each.

Be it known, that commissioners of Wilkes county are entitled to three hundred and thirty shares in the Northwestern North Carolina Railroad Company, transferable by the said commissioners, either personally or by attorney, only at the office and in the books of said company.

Witness, A. B. Andrews, president of the Northwestern North Carolina Company at Raleigh, N. C., under the seal of the corporation, this 9th day of May, A. D. 1890.

A. B. ANDREWS, *President.*

W. BROOK, *Secretary.*

Northwestern North Carolina Railroad Company, No. 160; six hundred and seventy shares. Capital stock, two million dollars. Shares, one hundred dollars each.

Be it known, that commissioners of Wilkes county are entitled to six hundred and seventy shares in the Northwestern North Carolina Railroad Company, transferable by the said —, either personal- or by attorney, only at the office and in the book- of said company.

Witness, A. B. Andrews, president of the said Northwestern North Carolina Railroad Company, at Raleigh, N. C., under the seal of the corporation, this 25th day of July, A. D. 1890.

A. B. ANDREWS, *President.*

W. BROOK, *Secretary.*

Certificate of Register.

NORTH CAROLINA, }
Wilkes County. }

I, E. M. Blackburn, register of deeds for Wilkes county, do hereby certify that the foregoing is a true copy, as occurs on railroad-claim book, as appears in my office.

E. M. BLACKBURN,
Register of Deeds.

February 14, 1898.

Affidavit of W. H. Watkins.

W. H. Watkins, being duly sworn, deposes and says that in November, 1868, he was living near Clemmonsville, Davidson county, N. C., about eleven miles southwest of the towns of Winston and Salem. That in November, 1868, he left home and went to work as a foreman of hands, who were engaged in grading the road-beds of the Northwestern North Carolina railroad, about six miles east of the town of Salem, on the Levi Crews place. That

there was under him about thirty-five hands. That he continued to work there in the construction of said road-bed during the winter of 1868 and the spring of 1869, and remained as such foreman of hands grading said road at different points along the line until the entire line of road between Winston and Greensboro was completed, two or three years afterwards. That during the winter of 1868 and spring of 1869 there were several companies of hands grading the said road-bed at different points along the line; and by the first of April, 1869, considerable grading had been done on said road-bed. That this work was being done by railroad company, under the general supervision of Edward Belo, now deceased, who was president of said railroad company.

W. H. WATKINS.

44 Sworn to and subscribed before me, this 28th day of January, 1898.

N. S. WILSON,
Clerk Superior Court,
By SAM F. VANCE, *D. C.*

Clerk's fee, twenty-five cents. Paid.

Affidavit of Rufus Harmon.

Rufus Harmon, being duly sworn, deposes and says that he was, in the year 1868, and is now, a resident of the town of Kernersville, in Forsyth county, North Carolina, a town on the line of the Northwestern North Carolina Railroad Company. That about the middle of October, 1868, Edward Belo, the president of the Northwestern North Carolina Railroad Company, sent to Kernersville for this affiant, and asked him to go on to Jonathan Crews' place, in Forsyth county, N. C., about three miles east of Salem, to build stockades for the hands employed by said Belo to grade the road-bed of said railroad. That this affiant went immediately, or within a few days, to the said Crews' place, and on his arrival found three companies of hand- with wheelbarrows, grading the road-bed of said railroad. That he remained with these companies of hands, made up of about twenty-five men each until some time in April, 1869, when he was transferred to work on the line of said railroad in Guilford county. There, companies of hands, at first with wheelbarrows and afterwards with cars and mules, worked in grading said railroad from the middle of October, 1868, to April, 1869, continuously, with the possible exception of a few wet or cold days. That in addition to the carpenter work done by him, he was appointed commissary of subsistance, and gave out the rations to the hands, and before leaving, in April, 1869, he was giving out rations to about one hundred and fifty railroad hands. Edward Belo, now dead, was president of the railroad company during these months, and had general charge of the building of the road. In April, 1869, he was appointed by the chief superintendent of hands, J. J. Cahill, assistant superintendent of the construction force, and was sent to Guilford county

and took charge of supplying the hands who were working in the county of Guilford on said road. That in April, 1869, several companies of hands began to work on the grading of the road in Guilford county, the work of grading continuing in the county of Forsyth. After remaining for some time at work in Guilford county, he was transferred to the work of grading at Bath Branch, in the county of Forsyth, just east of the town of Salem, N. C.

R. HARMON.

Sworn to and subscribed before me, this 21st day of January, 1898.

J. M. GUYER, *J. P.*

Fees, twenty-five cents. Paid.

Affidavit of C. C. Wright.

C. C. Wright, being duly sworn, says that he is and has been a citizen and resident of Wilkes county for thirty-five years; that he was cognizant of the proceedings had in the railroad election mentioned, on June 16, 1887, and of the subsequent election held on November 6, 1888; and that never before has he heard that the reason the Northwestern North Carolina railroad was not completed, in accordance with the proposition first submitted, was because it was voted to the Richmond and Danville Railroad Company, and not voted to the Northwestern North Carolina Railroad Company, as alleged in the affidavit of G. W. Hinshaw. But that the reason publicly given to the people of Wilkes county was that the
45 time was too short for the railroad company to build the road, and, therefore, an extension of time was asked.

C. C. WRIGHT.

Subscribed and sworn to before me, January 29, 1898.

H. R. STARBUCK, *Judge.*

Admission of Counsel.

I admit that the act of 1868, chapter 171, purporting to provide for submitting the question of subscription, was read three times on different days in each house of the General Assembly, and was passed in accordance with the requirements of the constitution, article 2, section 14.

I do not admit, either, that said act or any part of it was in force, when either vote was taken in Wilkes county, as set forth in the exhibit to the plaintiff's complaint, or that, if in force, it authorized either of said elections.

(Signed) A. C. AVERY.

Winston, February 15, 1898.

Injunction.

This cause coming on to be heard before Starbuck, judge, at chambers in Winston, upon a motion by plaintiff to enjoin defend-

ant until the final hearing from paying any portion of the principal or interest of the bonds issued by the county of Wilkes and described in the complaint. Upon consideration of the pleadings, treated as affidavits upon this hearing, the exhibits and all the affidavits and evidence introduced, it is now adjudged that the defendant, Clarence Call, sheriff of Wilkes county be, and he is hereby enjoined and restrained until the final hearing of this cause from paying any portion of the moneys belonging to the county of Wilkes, and in his hands upon the principal or interest of the said bond.

This February 18th, 1898.

(Signed) HENRY R. STARBUCK,
Judge Superior Court, Ninth Judicial District.

(To this judgment defendant excepts. Fifteen days allowed defendant to serve statement of case on appeal, and ten days thereafter allowed plaintiffs to serve exceptions or counter-statements. Appeal bond fixed at one hundred dollars.)

(Signed) H. R. STARBUCK, *Judge, etc.*

Order to Make New Parties Defendant.

On motion of Richard N. Hackett, counsel for J. M. Turner and J. M. Wellborn, and by consent of the plaintiff, the said J. M. Turner and J. M. Wellborn, as the owners of one of the bonds of the county of Wilkes, the validity of which is controverted in the above-entitled action, are allowed to make themselves parties defendant to said action, and to file an answer.

(Signed) ALBERT L. COBLE,
Judge Presiding.

Answer of J. M. Wellborn and J. M. Turner.

The defendants, J. M. Turner and J. M. Wellboro, in answer to complaint, say:

I. That since this action was brought they have become the owners of one of the bonds, the validity of which is controverted in the above-entitled action and which were issued by the county of Wilkes, the number and amount being set forth in the complaint; and that the bond, of which they have so become the owners, is numbered 34, of the series of one hundred, issued at the time mentioned in the complaint.

II. That they adopt the answer of their codefendant, Clarence Call, treasurer of Wilkes county, as their own, and ask that it be taken and considered as the answer of these defendants to all intents and purposes, as if these defendants had denied the allega-
46 tions of the complaint, which are controverted by said Call in detail, and in the very language used in the answer of said Call.

III. That these defendants are advised, informed and believe that the rights of themselves and of the other owners of the said one

hundred bonds, issued by the county of Wilkes, as owners of such bonds have not been adjudicated in this action.

IV. Wherefore, these defendants pray:

1. That the order made by his honor, H. R. Starbuck, judge, at chambers in Winston, N. C., containing the restraining order theretofore granted in this case, until the hearing of the cause, be vacated.

2. That said bonds be declared valid.

3. For such other and further relief as to the court may seem just.

4. For costs of action.

(Signed) RICHARD N. HACKETT,
Attorney for Defendants Turner and Wellborn.

J. M. Turner and J. M. Wellborn, being duly sworn, depose and say, each for himself, that the facts stated in the foregoing answer as of his own knowledge are true, and those stated on information and belief he believes to be true.

(Signed) J. M. TURNER.
(Signed) J. M. WELLBORN.

Sworn to and subscribed before me, this the 8th day of March, 1898.

(Signed) A. W. VANNOY,
Clerk Superior Court,
By H. T. SMOAK, *D. C.*

Order of Removal.

This cause, coming on to be heard before his honor, Coble, judge, upon motion of Richard N. Hackett, counsel for the defendants, J. M. Turner and J. M. Wellborn, who had been made parties defendant, and had answered at the present term of the court, to vacate and set aside the judgment of his honor, H. R. Starbuck, judge, rendered at chambers at Winston, and containing the restraining order theretofore made to the hearing of the cause; and it appearing that a holder of the bonds, the validity of which is controverted, is related by affinity to the presiding judge.

It is by consent of counsel for the plaintiffs and counsel for defendants, J. M. Turner and J. M. Wellborn, ordered that *that* the motion be removed, to be heard before H. R. Starbuck, judge riding the tenth judicial district, at chambers, at Marion, North Carolina, on Monday, March 14, 1898, at 8 o'clock p. m.

The counsel for the defendants, Turner and Wellborn, being engaged at a term of the superior court of Wilkes county, which is expected to last beyond the 14th of March, at the request of said counsel, the counsel for the plaintiff agrees that all of the testimony offered at the hearing at Winston, before Judge Starbuck, shall be considered as offered at the hearing at Marion, on the 14th instant, subject to any objections as to competency made at the former hearing; and that his honor, Judge Starbuck, at the time of said hearing at Marion, or as soon thereafter as may be convenient to him, may

make up a statement of case on appeal, without notice to the counsel, it being understood that the party against whom judgment may be rendered will desire to appeal to the supreme court of North Carolina.

It is further understood between counsel that the agreement
47 this day, signed with a view to hearing before Judge Coble of the motion submitted, shall be considered as binding on the hearing before Starbuck, judge, at Marion on March 14th.

(Signed) ALBERT L. COBLE,
Judge Presiding.

It is agreed that in addition to the pleadings and exhibits and affidavits offered at the former hearing, the original charter of the Northwestern North Carolina Railroad Company, passed by the constitutional convention of 1868, and all amendments thereto, including the amendatory acts of 1879 and 1881, shall be read in evidence; and that the amendments passed in 1879 and in 1881, purporting to give to another authority to submit the question of subscription to the capital stock of the company, were not passed by the house of representatives in accordance with the requirements of the constitution, and the certified exhibits from the journals of said sessions need not be offered or sent up as a part of the testimony.

It is agreed that the only legislation that is relied upon to give such authority is the original charter, passed as an ordinance of the constitutional convention of 1868, and the general statute enacted in 1868, as chapter —, being in the same language as contained in the Code, sections 1996 to 2000, both inclusive.

It is further agreed that the plaintiff still objects to the testimony offered for the defendant, Call, on the former hearing, to show when the Northwestern North Carolina Railroad Company was organized or incorporated.

(Signed) A. C. AVERY,
Attorney for Plaintiffs.

(Signed) RICHARD N. HACKETT,
Attorney for Defendants J. M. Turner and J. M. Wellborn.

Judgment.

This cause, coming on to be heard, upon motion of Richard N. Hackett, attorney for J. M. Turner and J. M. Wellborn, the holders of one of the bonds issued by the county of Wilkes, the validity of which is now in controversy in this action, and it appearing that said motion was made before Coble, judge, at the spring term, 1898, of the superior court of Wilkes county; and that the said judge, being related by affinity to some of the holders of the bonds in controversy, said motion was by consent of counsel removed, to be heard at chambers, at Marion, on the 14th of March, 1898; and by consent of counsel for plaintiffs and counsel for the said Turner and Wellborn, the hearing of said motion was continued, first to be heard at Winston on March 18th, 1898, and subsequently to be

heard at Morganton, on March 22d, 1898; and being heard at last-named time and place, before the undersigned, upon the testimony heretofore offered, as set forth in a written agreement of counsel:

It is now, on motion of A. C. Avery, Finley and Green and Thomas Dula, counsel for plaintiff-, and upon hearing and considering the documentary evidence, mentioned in said agreement of counsel, considered and adjudged, that the motion to vacate, made on behalf of the defendants, Turner and Wellborn, as holders of one of the bonds in controversy. The order heretofore made containing restraining order until the hearing of the cause, be refused upon the ground that the bonds in controversy were issued by the board of commissioners of Wilkes county, without lawful authority so to do, and are invalid and void.

From the judgment of the court, refusing to vacate the said order containing the injunction to the hearing, the defendants,
48 Turner and Wellborn, appealed. Notice of appeal was waived, and an appeal bond in the sum of one hundred dollars adjudged sufficient.

H. R. STARBUCK,
Judge Riding Tenth Judicial District.

Statement of Case on Appeal.

It having been agreed that the undersigned should make up the statement of case on appeal without summoning counsel, it is ordered that the portions of the record and the evidence mentioned in the agreement of counsel, entered into at spring term, 1898, in the superior court of Wilkes county, together with the summons pleadings, exhibits, orders, heretofore made, and the foregoing judgment, rendered at chambers, at Morganton, on the 22d of March, 1898, shall constitute the statement of case on appeal.

H. R. STARBUCK,
Judge Riding Tenth Judicial District.

I, A. M. Vannoy, clerk superior court for the county of Wilkes, do hereby certify that the foregoing is a true statement of the case on appeal, as made up by Starbuck, judge.

This March 30th, 1898.

A. M. VANNOY,
[SEAL.] *Clerk Superior Court.*

49 NORTH CAROLINA,
Wilkes County.

In Superior Court, Spring Term, 1898.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright
vs.
CLARENCE CALL, Treasurer, and J. M. TURNER and J. M. Wellborn.

Agreement of Counsel.

Amend section 3 of the answer of J. M. Turner and J. M. Wellborn by adding the words: "And defendants invite all other owners of said bonds to come in and make themselves parties defendant in this action, and to contribute to the cost of adjudicating their rights."

We agree that on motion of Richard N. Hackett, attorney for defendants Turner and Wellborn, the foregoing amendment was allowed by his honor Judge Starbuck to be made, but has in some way been lost out of the record, and counsel are willing that the Supreme Court shall consider it as a part of the record on appeal without printing.

A. C. AVERY,
Attorney for Plaintiffs.
RICHARD N. HACKETT,
Attorney for Defendants Wellborn & Turner.

Docket Entries.

Appeal docketed April 1, 1898; argued April 6, 1898; held under *advisari*. Opinion of the court by Douglas, J., filed November 9, 1898—Furches, J., and Faircloth, C. J., dissenting—as follows:

50 N. C. Supreme Court, Feb. Term, 1898.

COMMISSIONERS OF WILKES COUNTY
vs.
CLARENCE CALL ET AL., Appellants. # 338. Wilkes Co.

A. C. Avery for plaintiff; no counsel *contra*.

DOUGLAS, *J.*:

This is an action brought to test the validity of certain bonds issued by Wilkes county in payment of its subscription to the stock of the Northwestern North Carolina Railroad Company. The suit was brought by the commissioners of the county of Wilkes against the county treasurer. The defendants Turner and Wellborn, who had become the owners of one of the bonds after the bringing of this action, by leave of the court, became parties defendant and in-

vited all other bondholders to come in and join them in resisting the action.

In the face of each bond, dated Oct. 1, 1889, appears the explicit statement that "this bond is one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled 'An act to amend the charter of the Northwestern North Carolina railroad for the construction of a second division from the towns of Winston and Salem, in Forsyth county, up the Yadkin valley, by Wilkesboro, to Patterson's factory, Caldwell county,'" etc. The bond does not allude in any way to any other legislative act nor does it profess to claim further validity than that derived from the recited act.

It is admitted, as well as clearly shown by the evidence, that this act of February 20, 1879, was not passed in accordance with the mandatory provisions of the constitution of this State, as construed by this court, inasmuch as upon the passage of said bill upon its second reading in the house of representatives there was no call of the ayes and noes; and, further, that the vote upon such reading was not recorded in the journal of the house. Const., art. 2, sec. 14. The amendatory act of 1881 is subject to the same objection. In view of the recent decisions of this court, it is useless to discuss this question now, as the rule has been definitely settled in the
51 following cases: Bank *vs.* Commissioners of Oxford, 119 N. C., 214; Commissioners *vs.* Snuggs, 121 N. C., 394; Charlotte *vs.* Shepard, 120 N. C., 411, and 122 N. C., 602; Rodman *vs.* Town of Washington, 122 N. C., 39.

Under the authority of these decisions we are compelled to hold that the entire issue of these bonds is null and void for want of legislative authority. An act of the legislature passed in violation of the constitution of the State or in disregard of its mandatory provisions is to the extent of such repugnance absolutely void, and all bonds issued thereunder bear the brand of illegality stamped upon their face by the hand of the law.

52 The act under which these bonds profess to have been issued was never legally passed and never became a law. As was said in Norton *vs.* Shelby County, 118 U. S., 425: "An unconstitutional act is not a law; it confers no rights, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." The constitution of the State is plenary notice to the world of its organic law. There can be no *bona fide* holders of unconstitutional obligations, nor can ignorance of public statutes and legislative journals be deemed otherwise than wilful or negligent. The journals are published for the information of the public, and are widely distributed and easily accessible, fully as much so as the public records of a county. Surely no one would be heard to say that he was the *bona fide* owner of a piece of land simply because he held a deed therefor, when an inspection of the records would show that his grantor had no power to convey. It has been well said in U. S. *vs.* Macon County Court, 99 U. S., 582: "The difficulty lies in the want

of original power. While there has undoubtedly been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been *gross carelessness* on the part of purchasers when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound."

A careful distinction should be drawn between the want of power to issue bonds and mere irregularities in the exercise of that
53 power. The latter, under certain circumstances, may be cured by recitals or eliminated by estoppel; but a want of power goes to the very root of the transaction and destroys its vitality. A tree may yet live, though its branches are badly shattered by the storm, but the last leaf falls when the root is dead.

This rule has been clearly laid down by the Supreme Court of the United States in the oft-cited case of Anthony *vs.* County of Jasper, 101 U. S., 693, where Chief Justice Waite says: "Dealers in municipal bonds are charged with notice of the laws of the State granting power to make the bonds they find on the market. This we have always held. If the power exists in the municipality the *bona fide* holder is protected against mere irregularities in the manner of its execution, but if there is a want of power no legal liability can be created. When the bonds now in question were put out the law required that to be valid they must be certified to by the auditor of State. In other words, that officer was to certify them before their execution was complete, so as to bind the public for their payment. We had occasion to consider in McGarrahan *vs.* Mining Co. (96 U. S., 316) the effect of statutory requirements as to the form of the execution of patents to pass the title of lands out of the United States, and there say: 'Each and every one of the integral parts of the execution is essential to the validity of a patent. They are of equal importance under the law, and one cannot be dispensed with more than another. *Neither is directory, but all are mandatory.* The question is not what, in the absence of statutory regulations, would constitute a valid grant, but what the statute requires.' The same rule applies here. The object to be accomplished is the complete execution of a valid instrument, such as the law authorizes public officers to put out and bind for the payment of money the public organization they represent." By repeated adjudications this has become the settled rule of that court. Police Jury *vs.* Brit-
54 ton, 82 U. S., 566, 570, 572; Claiborne County *vs.* Brooks, 111 U. S., 400, 406; Bank *vs.* Porter Township, 110 U. S., 608, 618; Concord *vs.* Robinson, 121 U. S., 165, 167; Kelley *vs.* Milan, 127 U. S., 139, 150; Norton *vs.* Dyersbury, 127 U. S., 160, 175; Young *vs.* Clarendon Township, 132 U. S., 340; Hill *vs.* Memphis, 134 U. S., 198, 203; Merrill *v.* Monticello, 138 U. S., 673, 686, 687; City of Brenham *vs.* Bank, 144 U. S., 173; Savings Asso. *vs.* Perry County, 156 U. S., 692, 704.

But it is urged that, while the bonds were expressly issued under the act of 1879, there was, apparently unknown to both parties to the transaction, and certainly ignored by them, an existing authority

to issue said bonds derived from an ordinance of the constitutional convention passed in 1868, and that therefore we should hold that these bonds were unwittingly issued under that ordinance, and are therefore valid. The only authority we can find in that ordinance in any way authorizing the subscription to the stock of the company or the issuing of the bonds is as follows: "Section 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties, in shares of one hundred
55 dollars." "Section 12. Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or material for constructing said road, as the board of directors may determine, and that all counties or towns subscribing stock to said company shall do so in the *same manner and under the same rules, regulations and restrictions* as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company." That said ordinance cannot be relied on to support the validity of the bonds at issue is apparent for several reasons: First, we do not see that any authority whatever is given or attempted to be given by either of these sections to Wilkes county to subscribe to the capital stock of this company; but it is said that section 12, by referring to the charter of the "North Carolina and Atlantic Railroad Company," by which, we presume, is meant the Atlantic & North Carolina railroad, ch. 136 of the Laws of 1852, confers upon the different counties through or near which the Northwestern North Carolina railroad may run the same authority to subscribe as was given to the counties tributary to the former company. Said section does not refer generally to the act of 1852, nor does it profess to confer any of the powers therein granted. It simply says that those counties and towns that do subscribe "shall do so in the *same manner and under the same rules, regulations and restrictions*" as are prescribed in the former act. The words "same restrictions" are peculiarly significant here, as the act of 1852, section 45, provides in express terms that "if the said road be not completed within six years after the ratification of this act *this charter shall be forfeited.*"
Therefore, even if the powers granted in the act of 1852
56 had been given to the North Western North Carolina Railroad Company, or the counties in its interest, subject to the "same restrictions," those powers would have expired by their own limitation long before their attempted exercise 23 years thereafter. As all such powers must be strictly construed, this restrictive provision must be held to be in the nature of a limitation and not a condition subsequent—that is, the authority given to the counties to subscribe, if it ever existed, expired at the end of six years unless already exercised in such a way as to create vested rights; but it makes no difference how the power was exercised if there was no power. Section 12 of the ordinance of 1868 does not refer to section 33 of the act of 1852, which confers the power, but is evidently limited by its very terms to section 34, 35, and 36, which prescribe

the *manner* in which that power must be exercised by the counties or towns to which it may have been granted. It would have been very easy for the convention to have given the same authority granted in section 33, either in express terms or by reference to said section, but it has not done so, and we cannot do so by judicial construction. There is no principle better settled than that all charters granting special privileges or powers must be not only strictly construed, but must be construed most strongly against the grantee. This rule, with the reasons therefor, has been so clearly stated by Chief Justice Pearson in Railroad *vs.* Reid, 64 N. C., 155, 158, that we can do no better than to quote his language as follows: "It is equally well settled that contracts made by the State with individuals, in granting charters, are not to be construed by the same rules as contracts between individuals. In the latter case, the rule of the common law, which is the same as common sense, is, 'Words are to be taken in the strongest sense against the party using them,' on the idea that said interest induces
57 a man to select words most favorable for himself. It is otherwise where the State is a party. For it is known that in obtaining charters, although the sovereign is presumed to use the words, in point of fact the bills are drafted by individuals seeking to procure the grant, and that 'the promoters,' as they are styled in England, or the 'lobby members,' as they are styled on this side of the Atlantic, have the charters or acts of incorporation drafted to suit their own purposes, and a matter of this kind, instead of being in its strict sense a *contract*, is more like the act of an indulgent head of the family dispensing favors to its different members and yielding to importunity. So the courts, to save the old gentleman from being stripped of the very means of existence by sharp practice, have been forced to reverse the rule of construction and to adopt the meaning most favorable to the grantor." The same rule is laid down in Railroad Co. *vs.* Canal Commissioners, 21 Pa. St. Rep., 9, 22, where Chief Justice Jeremiah S. Black says for the court: "It may be that the privilege which the relators claim might arise by implication out of their charter or some other of the acts cited by their counsel if we were at liberty to give to them the broad construction which we sometimes apply to other laws of a different character; but corporate powers can never be *created by implication nor extended by construction*. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her own sovereignty and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud that every consideration of justice and policy requires that they should be treated as nugatory when they do find
58 their way into the enactments of the legislature. In the construction of a charter to be in doubt is to be resolved, and every resolution which springs from doubt is against the cor-

poration. This is the rule sustained by all the court- in this country and in England. No other has ever received the sanction of any authority to which we owe much deference. This court has asserted it times without number. We have ruled five or six important cases upon it within the last year. We seem not to have made much impression on the professional mind, and we are probably making as little now. But when respectable counsel call upon us hereafter (as they doubtless will) to enlarge corporate powers by construction we can only repeat again and again that our duty imperatively forbids it. The privileges of the Pennsylvania Railroad Company may be too rigidly restricted. If the usefulness of the company would be increased by extending them let the legislature see to it. But let it be remembered that *nothing but plain English words will do it.*"

It should be borne in mind that there is no pretence of authority for the issue of these bonds outside of the charter of the Northwestern North Carolina Railroad Company and its amendments. It has been the actor as well as the beneficiary throughout, and therefore the acts under consideration come peculiarly within the rule of strict construction laid down by the two great chief justices from whom we have quoted.

We have not overlooked the fact that in Below *vs.* Commissioners, 76 N. C., 489, this court strongly intimates that section 12 of the charter did confer the authority given in section 33 of the act of 1852; but it does so incidentally and with little discussion, because it was not denied in the pleadings. This was not the determining point in the case, which turned chiefly upon the recitals in the bonds and the ratifying act of 1868. This is already shown in the
59 opinion itself, which devotes four pages to the discussion of equitable estoppel arising on the recitals and about half a page to the possible binding effect of the ordinance, winding up with the significant sentence on page 497 that "as the case is presented to us, that question does not arise and we do *not* decide it." It evidently did not receive careful investigation, as it apparently did not arise on the pleadings. The court stated that "the principle of equitable estoppel is the most important element in the transaction," and that the recitals in the bonds (which were essentially different from those now before us) constituted an estoppel *in pais* upon the county of Forsyth. Can it be questioned that estoppels must be mutual, and that he who relies upon the recitals in the bond to estop another must himself be bound by them? If this is so, it ends the case at bar, as all the recitals point to the unconstitutional act of 1879. The Forsyth County bonds recited that *they* were "authorized by an ordinance of 1868, by an order of the court of pleas and quarter sessions of Forsyth county, at June term, 1868, and re-enacted and ratified and confirmed by an act of the General Assembly ratified the 11th of August, 1868." The cases are clearly distinguishable. Another important point of difference is that the Forsyth County bonds were voted and subscribed within a few months after the passage of the ordinance, before whatever power it may have given, if any had expired by its own limitation. It is

evident that the legislature, as well as the railroad company itself, thought that the authority given in the ordinance was not sufficient, as in both cases additional legislation was sought and obtained, but with this essential difference: In the case at bar, the amendatory act, having been passed in violation of mandatory provisions
60 of the constitution in legal contemplation, was never passed. As it has no legal existence, we have no authority to construe it, but simply to obliterate it. In Jarratt *vs.* Moberly, 103 U. S., 580, 588, the court, in discussing a similar case, says: "Further legislation was needed. Such was the evident opinion of the legislature of the State, for by an additional act, passed on the 29th March, 1872, the authority was given in terms," and on page 586 it says: "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation and suppress the mischief at which it was aimed."

Secondly. The bonds on their face profess to have been issued under an entirely different statute.

61 The principle laid down by the Federal authorities and practically of univeral acceptance is that estoppels rest upon the recitals in the bond. The rule is generally cited as laid down in Town of Colonia *vs.* Eaves, 92 U. S., 484, as follows: "When legislative authority has been given to a municipality, or to its officers, to subscribe to the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been *made in the bonds* issued by them and held by a *bona fide* purchaser is conclusive of the fact and binding upon the municipality; *for the recital is itself a decision of the fact by the appointed tribunal*" (Buchanan *vs.* Litchfield, 102 U. S., 278; Bank *vs.* Porter, 110 U. S., 608, 616).

In the case at bar the bonds recite that they were issued under the act of 1878, and as all estoppels of this nature, to be operative, must be mutual, are not the bondholders themselves estopped from setting up any facts to the contrary? These recitals point out the very act under which the power is claimed, and it was the duty of all persons claiming thereunder to see that the act met the constitutional requirements.

62 Certainly the estoppel can never go further than the recital itself. It cannot operate upon any other act, nor as to the validity of any act. In Gilson *vs.* Dayton, 123 U. S., 59, it was held that "as it appears on the face of the bonds sued on in this action that they were issued under the special act of February 18, 1857, which was held void in Post *vs.* Supervisors, 105 U. S., 667, and not under the general law of March 6, 1867, the judgment dismissing the action is affirmed." As was said in County of Daviess *vs.* Heidekoper, 98 U. S., 98, 100, "there indeed be power which, if formally and duly exercised, will bind the county or town. No *bona fides* can dispense with this, and no recital can excuse it." In

Dixon County *vs.* Field, 111 N. C., 83, 92, it was held that the estoppel arising from recitals in the face of the bonds never extended to or covered matters of law, and could arise only "upon matters of fact, which the corporate officers had authority to determine and to certify."

Thirdly. That ordinance did not create a contract between the railroad company and the county of Wilkes. The only contract that has ever existed between them was the contract of 1888, which was subject to all the constitutional provisions then existing. The mere authority given in the charter of a railroad company to receive subscriptions from municipal corporations, where no consideration is given and no attempted exercise of the power, has none
63 of the essential elements of a contract and is held at the pleasure of the law-making power. Much more so is it subject to constitutional restrictions. Town of Concord *vs.* Bank, 92 U. S., 625, 630; Concord *vs.* Robinson, 121 U. S., 165, 169; Loan Asso. *vs.* Perry County, 156 U. S., 692, 697. Concord *vs.* Bank, *supra*, was overruled in Fairfield *vs.* Gallatin, 100 U. S., 47, only in so far as it applied to the constitution of Illinois, and for the only reason that the Supreme Court of the United States deemed it proper, in the construction of a State constitution, to follow the State decisions instead of their own view of the law. The general principle remains unchanged and meets our approval.

64 The ratification of the constitution on the 24th day of April, 1868, when it went into effect for all domestic purposes, annulled all special powers remaining unexecuted and not granted in strict accordance with its requirements. Article II, section 14, is as follows: "No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the journal." Article VII, section 7, is as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied, or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein." The intention of the constitution is obvious. Profiting by the sad experience of other States, it intended to restrict the granting of public aid, and to hold to the strictest accountability every member of the legislature who assisted in such grant by forcing him to twice record his vote on the journal where it would be open to public inspection. It further intended that every such grant should be the deliberate and intelligent act of the legislature itself, as well as of the community affected thereby. It is our duty to give to these salutary provis-

ions that just construction required alike by the rules,
65 of law and of common sense that will effectuate and not destroy their beneficial purpose. This view, we think, is sustained by the uniform decisions of the Supreme Court of the United States, the only tribunal before which this decision can ever lawfully come for review. In Wadsworth *vs.* Supervisors, 102 U. S., 534, 537 (citing and reaffirming Aspenwall *vs.* Commissioners of Davies County, 22 How., 364), the court says: "We held in that case that the popular vote did not itself create a vested right in the railroad company to the bonds, and that a subscription was necessary to create a contract binding the county to issue bonds in payment of the stock and binding the company to receive stock for the bonds. 'Until the subscription is made,' said Mr. Justice Nelson, speaking for the whole court, 'the contract is unexecuted and obligatory on neither party;' hence the new State constitution was held to govern the case, and from the time of its adoption to have withdrawn from the county commissioners all authority to make subscriptions to the stock of incorporated companies, except in the manner and under the circumstances prescribed in that instrument." In Norton *vs.* Brownsville, 129 U. S., 479, 490, Chief Justice Fuller, speaking for the entire court, says: "These cases (referring to Concord *vs.* Savings Bank, 92 U. S., 625; Falconer *vs.* Railroad, 69 N. Y., 491; Railroad *vs.* Falconer, 103 U. S., 821; Wadsworth *vs.* Supervisors, 102 U. S., 534, and Aspenwall *vs.* Commissioners, 22 Howard, 364) sufficiently illustrate the distinction between the operation of a constitutional limitation upon the power of the legislature and a constitutional inhibition upon the municipality itself. In the former case past legislative action is not necessarily effective, while in the latter it is annulled. Of course, if an entirely new organic law is adopted, provision in the schedule or some other
part of the instrument must be made for keeping in force
66 all laws not inconsistent therewith, and this was furnished in this instance by the first section of article 11, but such a provision does not perpetuate any previous law, enabling a municipality to do that which it is subsequently forbidden to do by the constitution. The inhibition being self-executing and operating directly on the municipality and not in itself enabling the latter to proceed in accordance with the rule prescribed, further legislation is necessary before the municipality can act." In the late case of Railway *vs.* Texas, 170 U. S., 226, it is held that "a clause in a charter of a railroad company granting it power to consolidate with or become the owner of other railroads is *not* such a vested right that cannot be rendered inoperative by subsequent legislation passed before the company avails itself of the power thus granted." It is useless to cite the cases themselves cited in the cases referred to herein.

It is further urged on the part of the defendants and those whom they represent that the issuing of these bonds was authorized by sections 1996 to 2000 of the Code. This question was definitely settled
in Commissioners *vs.* Snuggs, 121 N. C., 394, 400, 401, and we
67 see no reason to reverse our ruling nor do we find any facts taking this case from its operation. We can add nothing on

this point to what was therein so fully and ably said in the opinion of the court, except to say that if the construction contended for by the defendants must be placed upon those sections, then they are in direct violation of the letter and spirit of the constitution, inasmuch as they practically annul one of its essential provisions. If the word "uncompleted" can refer to any road not yet begun and the word "interest" apply to a mere friendly feeling or supposed advantage to be derived from the general building up of the country, then the several counties may go on forever subscribing unlimited amounts to any railroad *in esse* or *in futuro* that may be located within the range of their knowledge. Such a construction would simply nullify the constitution by making its explicit restrictions vain and worthless. It cannot be adopted by us, but if we were forced to adopt it we would be equally forced to declare those sections null and void. If they mean that, they have no place upon the statute books. While the legislature may, in individual cases, grant to specific counties the necessary authority in accordance with the provisions of the constitution and subject to its restrictions, it cannot, by a sweeping act of unlimited application, utterly destroy its operation. If the legislature or the railroad company or the county had placed any such construction on those sections, additional legislation would have been deemed useless and the recitals in the bonds would have been different. It is true that this road had been begun and was in one sense uncompleted when the subscription was made, but it was *not* begun when the constitution was ratified, and the county at that time had no pecuniary interest in it nor any interest contemplated by the statute.

68 It is not necessary for us to consider the fact that the first section of the road had been completed to Winston, beyond which all idea of extension seems for years to have been abandoned. The act of 1881 has no reference to the bonds in question, and is subject to the same objections as the act of 1879, which we have been discussing.

We have given this case the most thorough investigation and careful consideration on account of the important principles and the large amount involved. We deeply deplore the fact that many parties must suffer who are in morals, if not in law, innocent holders of the bonds; but their loss comes from their misplaced confidence in those from whom they received the bonds and the negligence of the corporation to which the power was professedly given and the bonds were issued. The only authority for their issue is found in a railroad charter, and we cannot undertake to validate defective or unconstitutional legislation by judicial construction. The suggestion of repudiation, so strongly urged here and elsewhere, has no weight with us. The so-called repudiation of an unconstitutional obligation is a contradiction in terms, and its assertion amounts simply to a moral and legal absurdity.

It has been said that the usual difference between heterodoxy and orthodoxy is the difference between your doxy and my doxy, and that in financial ethics the same distinction exists between stealing and financeering. This distinction we cannot endorse. It is just

as wrong to wring from an unwilling and perhaps a suffering debtor an unjust debt as it is to deprive a creditor of a just debt. We will try to do neither, but will hew to the line. The strictly moral aspect of the case is not before us, but it is possible that the plaintiffs, representing an honest, industrious, and intelligent
69 people, may have reason for their action as strong in morals as in law.

Enough appears to indicate what is common knowledge that the railroad does not touch the county of Wilkes, and that the stock for which these bonds were issued has been swept away in the maelstrom of corporate reorganization. It may be that the plaintiffs, deprived of every vestage of consideration by the decree of a court of equity, may not feel any moral obligation beyond the strict letter of the law. They may see no difference between repudiation and reorganization when both accomplish the same result to retain the benefit and shift the burden.

70 In Lewis *vs.* Pina County, 155 U. S., 54, 58, it was held that bonds issued under an act of the legislature of the Territory of Arizona which was in violation of the Revised Statutes of the United States *were void, and "created no obligation against the county which a court of law can enforce."* In the carefully considered case of Brenham *vs.* Bank, 144 U. S., 173, 182, 188, the court says: "It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds, and, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case. * * * As there was no authority to issue the bonds, even a *bona fide* holder of them cannot have a right to recover upon them or their coupons." Citing Marsh *vs.* Fulton County, 10 Wall., 676; East Oakland *vs.* Skinner, 94 U. S., 255; Buchanan *vs.* Litchfi*l*ed, 102 U. S., 278; Hayes *vs.* Holley Springs, 114 U. S., 120; Davies County *vs.* Dickinson, 117 U. S., 657;
71 Hopper *vs.* Covington, 118 U. S., 148, 151; Merrill *vs.* Monticello, 138 U. S., 673, 681, 682.

The current of authority from other States sustains the conclusions we have reached in this case, but owing to the large number of cases we have thought it best to cite only from our own decisions and those of the Supreme Court of the United States.

For the reasons stated in this opinion, the judgment of the court below is affirmed.

72 FURCHES, *J.*, dissenting:

On the 9th of March 1868, the constitutional convention of North Carolina passed an ordinance chartering and authorizing the formation of a corporation to be known as the "North Western North Carolina Railroad Company." Under this charter said company was formed and organized, and on the 25th of March, 1868, the county of Forsyth subscribed $100,000 to said corporation, which subscription was held to be valid in Hill *vs.* Commissioners, 67 N. C., 367. In payment of this subscription the county of Forsyth issued coupon bonds to the amount of $100,000, and they were held to be

valid against the county in Belo *vs.* Commissioners, 76 N. C., 489, and the work of constructing said road between Greensboro, in the county of Guilford, and Winston, in the county of Forsyth, was commenced. This part of the road was completed and put into operation within the next few years and has continued to be run and operated ever since.

This charter made Winston a point to which the road should run west of its starting point on the North Carolina railroad. From this point (Winston) it was authorized to build branch roads, but none were built until 1887, when the company proposed to build a branch of its road from Winston to or near Wilkesboro, in Wilkes county, provided Wilkes county would make a subscription of $100,000 to the capital stock of said company.

This proposition to subscribe $100,000 to the capital stock was submitted to the qualified voters of said county by the commissioners thereof; the vote taken, a majority of the whole qualified voters of said county voted for the subscription. The subscription was made and the road built to Wilkesboro in compliance with the agreement of the railroad company, and the bonds now asked to be declared invalid were issued by the county, delivered to the
73 railroad company, and the interest thereon regularly paid until the commencement of this action. All these facts are shown by the record and are admitted to be true. But there having been a change in the personnel of the board of commissioners since said bonds were issued and since said road was built, this new board is seeking in this action to repudiate the action of the former board.

I understand the court to rest its opinion on two grounds: the want of power in the commissioners to submit the proposition to the voters and to issue the bonds and the doctrine of estoppel. If there is error in these positions, I shall contend that the conclusion to which the court has arrived is erroneous and should be reversed.

I admit that if the commissioners had no legislative authority to submit the proposition of subscription to the voters of Wilkes that these bonds are void and the judgment of the court is correct, but I propose to show that they had this authority and that the bonds are valid.

The charter (the ordinance of the convention) in express terms makes the charter of the Atlantic & North Carolina Railroad Company a part of the charter of the North Western North Carolina Railroad Company so far as it relates to the subscription of counties to the capital stock of the company. This being so, the charter of the Atlantic and North Carolina Railroad Company is to be read and considered as a part of the charter of the North Western North Carolina Railroad Company. Range Co. *vs.* Carver, 118 N. C., 328; Commissioners *vs.* Higginsbothern, 17 Kansas, 62. It is like an instrument referring to another instrument—Flaum *vs.* Wallace, 103 N. C., 296—or where the complaint in one action refers to the complaint in another action for data—Alexander *vs.* Norwood, 118 N. C., 381—they are to be read and considered together as one instrument.

74 I have shown that the subscription made to this company (the North Western North Carolina Railroad Company) by the county of Forsyth under the charter as originally passed has been sustained and held to be valid by this court in Hill *vs.* Commissioners, *supra.*

This decision established the power—the authority—to submit the proposition of subscription to the voters of the county and to issue bonds. But the validity of the bonds issued on this subscription of Forsyth was again put directly in issue in the case of Belo *vs.* Commissioners of Forsyth in a mandamus proceeding to compel their payment, and their legality was again sustained by this court. Belo *vs.* Commissioners, 76 N. C., 489. This case also, as I contend, established the authority to submit the question to the voters and to issue these bonds.

It is true that the submission of this question in Forsyth was made by the justices of the peace acting as a county court, and it is true that the charter provides that the question should be submitted by them, but this charter was passed and this submission was made and bonds issued before the adoption of the constitution of 1868, which did not go into effect until the 22nd of April of that year. By this constitution and subsequent legislation the county court was abolished, and the county commissioners succeeded to their powers in this matter and in all such cases. It is so held by this court in Belo *vs.* Commissioners, *supra*, and it is expressly so provided by the legislature. Section 1997 of the Code.

Therefore, while the submission of the question in Wilkes was by the commissioners, they were the successors of the justices and the county court, fully and clearly authorized to make the submission and the subscription, and to issue the bonds.

75 But it is contended by the court that if the charter authorized this subscription and the issue of the bonds now sought to be repudiated that it was passed before the constitution of 1868 went into effect, and that it was thereby repealed. To support this position Aspenwall *vs.* Commissioners of Davisse County, 22 Howard, 364, and Lewis *vs.* Pima County, 155 U. S., 54, are cited by the court. Neither of these cases, in my opinion, sustain the position for which they are cited. The first case cited (22 Howard) is intended to raise the question of violating a contract under the Constitution of the United States, and nothing more. The submission in that case was made and the vote thereon was had in 1849, but the subscription to the capital stock was not made, and the bonds were not issued until 1852. In the meantime the constitution of the State (Indiana) had been amended so as to prohibit any county in the State from issuing such bonds. But Davisse county proceeded to issue the bonds under said submission and vote and to put them on the market, but afterwards refused to pay them, and the plaintiff, being the holder of a part of these bonds, undertook to enforce their payment. There was no question made in that case but what the constitution had inhibited their issue. But the plaintiff claimed that the submission and the vote thereon, which were before the amended constitution, amounted to a con-

tract, and that the new constitution, which prohibited the county from issuing the bonds, was an impairment of the obligation of this contract, and therefore in violation of the Constitution of the United States. No such question as this arises in this case. There is no pretense that these bonds are protected by any provision of the Constitution of the United States.

But it is denied by the defendants that the constitution of 1868 repealed the charter of this road or that it prohibited Wilkes county from making this subscription or from issuing these bonds, as I expect to show.

76 The case of Lewis *vs.* Pina County arose out of the legislation of Arizona Territory. The legislature of this Territory passed an act authorizing Pina county to issue bonds for the construction of a railroad. This being a territorial government, it had no legislative powers except those granted by Congress. And it was held in that case that Congress had not only failed to grant such legislative power, but had in express terms prohibited its exercise, and the bonds were held to be void. I failed to see the argument to be drawn from this case against the validity of the bonds under consideration. As has been stated, the charter of the North Western North Carolina railroad was passed before the adoption of the constitution of 1868, which took effect on the 22nd of April of that year. But the legislature passed an act ratified on the 11th of August, 1868, as follows:

"SECTION 1. The General Assembly of North Carolina do enact, That an ordinance entitled 'An ordinance to incorporate the North Western North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be, and the same is hereby re-enacted, ratified, and confirmed."

If there had been a repeal of this charter by the constitution, which I contend there had not been, it seems to have been expressly re-enacted in August, 1868.

It has not escaped my attention that there is in the printed record an agreement as to what acts are to be considered by the court in deciding this case, and the act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs and by counsel for Mr. Turner and Mr. Welborne, but it is not signed by any one for the defendant Call. But if it had been signed by Call, I would have to disregard it. Parties may agree upon facts that I would feel bound by, but I cannot feel bound by an agreement as

77 to what is the law. I refer to this act of 1868 for the purpose of meeting an argument in the opinion of the court, and not for the reason that I consider it necessary to sustain the position I have taken as to the authority of the commissioners of Wilkes county to submit this question to the voters, and to subscribe the stock, and to issue the bonds.

The charter provides for submitting the question to a vote of the people in almost, if not the language of the constitution of 1868, with the single exception that it shall be sufficient if a majority of the qualified voters "voting thereon shall be in favor of the subscription." To this extent and no further did the constitution of

1868 conflict with the provisions of this charter, and this was cured by section 1997 of the Code, which was admitted to have been passed as the constitution requires, and which provides that it shall take a majority of the qualified voters of the county to authorize the subscription, as was done in this case. Suppose that section 1997 of the Code had been passed by the legislature as an amendment to this charter, with all the formalities and requirements of the constitution, would it be contended that the submission was without legislative authority and that these bonds were void; and, if not, why is it that a general law applying to all cases of submission has not the same effect?

The next ground upon which the court rests its opinion is that of estoppel. This ground of alleged invalidity to the bonds arises in this way: The legislature at its February session, 1879, attempted to pass and did pass an act providing for the extension of the North Western North Carolina railroad from Winston to Wilkesboro, for the subscription of counties to its capital stock, and the issue of bonds, but it is claimed by the plaintiff, and such appears to be the fact, that this act did not receive the three several readings on three several days with a call of the yeas and noes, as provided by the constitution, and for that reason that the said
78 act is void under Bank *vs.* Commissioners, 119 N. C., 214, and Commissioners *vs.* Snuggs, 121 N. C., 400; but the commissioners, when they issued these bonds, did not know that this act was unconstitutional and void, and they recited in the bonds that they were issued under the act of 1879. This act does not purport to be an original act, but it is stated in the act itself that it is an amendment to the ordinance of the convention chartering said road. So that any one seeing these bonds would be led by the statements therein to know that they depended upon authority derived from the original charter—that is, the ordinance of the convention of 1868; and it is claimed in the opinion of the court that this recital in the bonds, put there by the plaintiffs, estops the holders and those representing them from showing any other authority in the commissioners except the act of the 20th of February, 1879, and that that act being void, for the reasons heretofore stated, the commissioners had no power to issue the bonds. I admit that this act is a nullity and cannot benefit the bondholders; and, as it is void and can do them no good, it can do them no harm.

The court therefore, upon this recital in the bonds that they were issued under the act of February 20, 1879, again rests its judgment upon the doctrine of estoppel, and holds that the bondholders and the defendants in this action are estopped to show that the commissioners had any other authority except the said act of 1879.

With the greatest respect and deference to the opinion of the court, it seems to me that the doctrine of estoppel is not only misapplied, but that its use and purpose are misconceived in this application by the court. Estoppels are as to facts, and not of law. In such transactions as this they are made to apply to a party stating the facts, and not to the party to whom they are stated. This seems to me to be elementary learning; but see Bigelow on Estop-

pel, pages 4, 5, 6, and 7, and 356, and note 1: "It is not the
79 deed of the defendant, but of Isham (the grantor) only, by whom alone it is executed; and not being the deed of the defendant, it cannot, as a deed, estop him from denying that the grantor had title." And the same principle is held in the case of Northern Bank *vs.* Porter Township, 110 U. S., 608, near the end of the opinion (cited by the court). In that case the bondholder was trying to estop the maker by holding him to the statements in the bond, and the court says that the maker is estopped by the recital of such facts as it was supposed to have special knowledge of, such as that there had been a submission to a vote, and that a majority of the qualified voters voted for the bonds. But it was held that the defendant (the maker) was not estopped to show the law—to show that the township had no legal authority to make the subscription and to issue the bonds. If the maker of the bonds was not estopped by the recitals in the bond from showing the want of legal authority to make the bonds, what rule of law or justice is there to estop the defendants in this case from showing that the commissioners of Wilkes county had the power — legal authority to issue these bonds?

It is said in the opinion of the court that "estoppels are mutual," and as the plaintiff would be estopped by the recitals that the defendant must be. This rule obtains in many instances, but I deny its application in this case, as I have shown above from Bigelow on Estoppel and from Northern Bank *vs.* Porter Township. But were I to admit the rule to be that where one party is estopped the other party is also, what would be the result of the reasoning of the court when I have shown that the maker would not be estopped to show the want of power?

The court in its opinion says that certain positions were strenuously insisted on by the defendant. I think this must be a mis-
80 take, as the case was not argued before us, either by brief or by oral argument, on behalf of the defendants. Mr. Turner and Mr. Welborn, by leave of court, made themselves parties defendant after the action was brought, but they have given the case no further attention. Why they did this I do not know. The case appears to be a controversy so far as parties are concerned, for there are plaintiffs and there are defendants. But as to the conduct of the case before this court is concerned it has been unilateral. The opinion of the court speaks of the reorganization of the railroad company, thereby defrauding some one out of his stock. The record furnishes no evidence of any reorganization of the railroad company. It is stated in the opinion of the court that the Supreme Court of the United States is the only court authorized to review this opinion. I agree with the court in this expression of opinion, but I have no idea that it will ever be reviewed by that court, as the case is decided in favor of plaintiffs, and the defendants have not taken interest enough in it to be represented by counsel, and it is not likely they will appeal.

It is said that the talk of repudiation has had no effect on the court, and I have no idea that it has, and I hope that my aversion

to repudiation has had no influence on me in coming to the conclusions I have reached.

My opinion is that the bonds are valid and that their payment should be enforced by the courts.

FAIRCLOTH, C. J.: I concur in the dissenting opinion.

81 September Term, 1898.

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Wilkes county; upon consideration whereof this court is of opinion that there is no error in the record and proceedings of the said superior court.

It is therefore considered and adjudged by the court here that the opinion of the court, as delivered by the Honorable R. M. Douglas, justice, be certified to the said superior court, to the intent that the judgment be affirmed, and it is considered and adjudged further that the defendants do pay the costs of the appeal in this court incurred, to wit, the sum of twenty-four $\frac{30}{100}$ dollars ($24.30), and let execution issue therefor.

82 North Carolina Supreme Court.

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the action entitled The Board of Commissioners of Wilkes County and C. C. Wright against Clarence Call, treasurer of Wilkes county, and J. M. Turner and J. M. Wellborn, as appears of record in this court.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this 30th day of November, 1898.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk of the Supreme Court.

83 Supreme Court of the United States, October Term, 1898.

J. M. TURNER and J. M. WELBURN, Plaintiffs in Error,
vs.
THE BOARD OF COMMISSIONERS OF WILKES COUNTY and C. C. Wright, Defendants.

In error to the supreme court of North Carolina.

The undersigned, Richard N. Hackett and A. C. Avery, representing as counsel, respectively, the plaintiff- in error and the defendant above named, have observed that Justice Furches, in his dissenting opinion, calls attention to the fact that they omitted specifically to mention the act of August, 1868, as one of the statutes purporting to authorize the commissioners of Wilkes county to create the

bonded debt which gives rise to the controversy, and deem it due to themselves to submit a statement by way of explanation.

Out of the abundance of caution, counsel had filed certified copies of extracts from the legislative journals and certificates of the secretary of state, as custodian of the journals, showing the failure to pass certain other amendments to the charter of the North Western North Carolina Railroad Company in the manner prescribed by sec. 14, art. 2, of the constitution; but those records and certificates had cost the county from twenty-five to fifty dollars each. It had not been directly decided in North Carolina that the printed journals of the legislative houses would be competent evidence, though it had been so held in construing similar provisions of the constitution and laws of Illinois.

It appeared from an inspection of the Journals of the Senate of North Carolina of the Session of 1868 that on the 24th day of July, 1868 (see page 97, printed Journals of Senate of 1868), senate bill 45, "A bill ratifying and confirming the charter of the North Western North Carolina Railroad Company," was considered in committee of the whole and reported by the committee recommending its
84 reference to the committee on internal improvements; that on the 25th day of July, 1868, Mr. Forlkner, for said committee, reported said bill back to the senate and recommended its passage (see printed Senate Journal, page 101), and that no further action was taken on said bill until July 27th (see pages 101 to 108, both inclusive, of said printed Journal of the Senate), when the following entry appears: "The report of the committee on internal improvements, to whom was referred—

S. 45, a bill ratifying and confirming the charter of the North Western North Carolina Railroad Company was taken up and concurred in by the senate.

The bill passed its third and final reading by the following votes: * * *"

The language above quoted from the journals is followed by a statement of the names of 33 senators voting yea, and that there were no nays. The undersigned were unable to find any evidence in the journals that the said bill had been passed by the senate on its second reading and on a call of the yeas and nays on a day different from that on which it passed its third reading in said body.

The undersigned find (see page 109 of the printed Journal of the House at the same session) that on the 28th day of July the said bill was transmitted to the house of representatives, and that on August 11th, the following account is recorded of its passage on the third reading, to wit:

"The senate bill to ratify the charter of the North Western North Carolina Railroad Company passed its third reading."

The undersigned find also that on the 11th day of August, 1868, said bill was enrolled and was signed by the speaker and was transmitted to the senate, and that therefore the act referred to by Justice Furches was not passed in the manner prescribed by the constitution.

The undersigned therefore submit, as an explanation of
85 the omission to which Justice Furches calls attention, that they did not deem it necessary to subject the county of Wilkes to the expense of offering the certified record of legislative proceedings, for the reason that the question whether an act not passed in conformity to the said requirement of the constitution was valid had already been raised after the act of 1879 recited as authority for issuing the bonds, and if the court should hold the act of 1879 invalid, the act of August, 1868, passed after the ratification of *of* the constitution of 1868, would also be held invalid, but if the court should hold that the act of 1879 was valid as authority for issuing the bonds, it would be unnecessary to look for further authority in the acts of 1868.

Respectfully submitted.

RICHARD N. HACKETT,
For Plaintiffs in Error.
A. C. AVERY, *For Defendants.*

[Endorsed:] J. M. Turner and J. M. Welburn, plaintiffs in error, *vs.* The Board of Commissioners of Wilkes County and C. C. Wright, defendants. Agreement of counsel. Filed —day of ——, 1899.

86 [Endorsed:] File No. 17,227. Supreme Court U. S., October term, 1898. Term No., 642. J. M. Turner *et al.*, pl'ffs in error, *vs.* The Board of Commissioners of Wilkes Co. *et al.* Agreement of counsel in regard to statement in dissenting opinion in court below. Filed Jan. 30, 1899.

Endorsed on cover: File No. 17,227. North Carolina supreme court. Term No., 642. J. M. Turner and J. M. Wellborn, plaintiffs in error, *vs.* The Board of Commissioners of Wilkes County and C. C. Wright. Filed December 19, 1898.

No 642.

Brief of Hackett for Pltffs in Error.

Filed Feb. 20, 1899.

FEB 20 1899

Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

. M. TURNER AND J. M. WELLBORN, PLAINTIFFS IN ERROR,

VERSUS

HE BOARD OF COMMISSIONERS OF WILKES COUNTY AND C. C. WRIGHT, DEFENDANTS.

In Error to the Supreme Court of the State of North Carolina.

rgument of RICHARD N. HACKETT, Attorney for Plaintiffs in Error.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

J. M. TURNER AND J. M. WELLBORN, PLAINTIFFS IN ERROR,

VERSUS

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND C. C. WRIGHT, DEFENDANTS.

In Error to the Supreme Court of the State of North Carolina.

Argument of RICHARD N. HACKETT, Attorney for Plaintiffs in Error.

STATEMENT OF CASE.

This was an action brought to test the validity of certain bonds issued by Wilkes County in payment of its subscription to the stock of The Northwestern North Carolina Railroad Company. The suit was brought by the Commissioners of the county of Wilkes against the County Treasurer. The defendants Turner and Wellborn, who had become the owners of one of the bonds, by leave of the court after the bringing of this action, became parties-defendant, and invited all other bondholders to come in and join them in resisting the action.

On the 9th of March, 1868, the Constitutional Convention of North Carolina passed an ordinance chartering and authorizing the formation of a corporation, to be known as "The Northwestern North Carolina Railroad Company." Under this charter said company was formed and organized; and on the 25th of March, 1868, the county of Forsyth subscribed $100,000 to

said corporation, which subscription was held valid in "Hill v. Commissioners," 67 N. C., 367. In payment of this subscription, the county of Forsyth issued coupon bonds to the amount of $100,000, and they were held to be valid against the county in "Belo v. Commissioners," 76 N. C., 489, and the work of constructing said road between Greensboro, in the county of Guilford, and Winston, in the county of Forsyth, was commenced in 1868. This part of the road was completed and put into operation within the next few years and has continued to be run and operated ever since. The charter made Winston a point to which the road should run, west of its starting point on the North Carolina Railroad. From Winston it was authorized to build branch roads. In 1887 the company proposed to build a branch of its road from Winston to or near Wilkesboro, in Wilkes County, provided Wilkes County would subscribe $100,000 to the capital stock of said company. This proposition to subscribe $100,000 to the capital stock was submitted to the qualified voters of Wilkes County by the Commissioners thereof. The vote was taken on the 16th day of June, 1887, at which time a majority of the whole qualified voters of said county voted for the subscription. Work was begun on said road shortly thereafter, and continued until the completion thereof, in 1890.

In 1888, for reasons set forth in the pleadings, another election was held on the 6th day of November, after being properly authorized and ordered by the Commissioners of Wilkes County; at which election a majority of the qualified voters of Wilkes County voted to subscribe $100,000 to the capital stock of The Northwestern North Carolina Railroad Company for the purpose of aiding in the completion of said road from Winston to Wilkesboro, said road being then partly graded and in an unfinished condition. The subscription was made and the road built to Wilkesboro in compliance with the agreement of the railroad company; and the bonds now asked to be declared invalid were issued by the county, delivered to the railroad company, and, as appears by the evidence, sold to purchasers for value, and the interest thereon regularly paid until the commencement of this action. The bonds in controversy were held

invalid by his Honor, Starbuck, Judge of the Superior Court of North Carolina, from which judgment the defendants Turner and Wellborn (plaintiffs in error here) appealed to the Supreme Court of North Carolina, where the opinion of his Honor, Starbuck, Judge, was affirmed by a majority of the Supreme Court, Associate Justice Furches and Chief Justice Faircloth dissenting.

STATEMENT OF DATES.

Ordinance chartering Northwestern North Carolina Railroad Company, passed by Constitutional Convention of North Carolina, March 9, 1868.

The Constitution of North Carolina was ratified April 25, 1868.

Sections 1996 to 2000 of The Code of North Carolina first enacted in 1869.

The Code of North Carolina was adopted in 1883.

The amendments to the charter of The Northwestern North Carolina Railroad were passed in 1879, chapter 43, and 1881, chapter 156.

Charter of Northwestern North Carolina Railroad confirmed on August 11, 1868. (See agreement of counsel relative to this, in printed record.)

Work begun on Northwestern North Carolina Railroad as early as October, 1868. (See affidavits of W. H. Watkins and R. Harmon.)

Subscription of $100,000 to capital stock of Northwestern North Carolina Railroad Company voted June 16, 1887, and work began on extension of said road from Winston to Wilkesboro within ninety days thereafter, continuing till the completion of said extension in 1890.

Subscription of $100,000 to the capital stock of said Northwestern North Carolina Railroad Company again voted on November 6, 1888, and bonds in controversy issued in 1890.

ASSIGNMENT OF ERRORS.

First. That the Court erred in holding that the original charter of The Northwestern North Carolina Railroad Company

and the amendments thereto, enacted in the year 1868, did not authorize the Board of Commissioners of Wilkes County to submit the question whether said county should subscribe to the capital stock of said company, or to subscribe $100,000, with the approval of the qualified voters of said county, to the capital stock of said company. And said J. M. Turner and J. M. Wellborn, plaintiffs in error, say, that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section, by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board.

Second. That the Court erred in holding that the subscription of $100,000 to the capital stock of The Northwestern North Carolina Railroad Company by the Board of Commissioners of Wilkes County was not authorized by the amendments to the charter of the said Northwestern North Carolina Railroad Company, enacted after the year 1868. And the said J. M. Turner and J. M. Wellborn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section, by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board.

Third. That the Court erred in holding that the subscription of $100,000 to the capital stock of The Northwestern North Carolina Railroad Company by the Board of Commissioners of Wilkes County, was not authorized by the provisions of The Code of North Carolina, sections 1996 to 2000, inclusive. And the said J. M. Wellborn and J. M. Turner, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board.

Fourth. That the Court erred in holding that the holders of any or all of the $100,000 in bonds, executed by the Board of Commissioners of Wilkes County, and exchanged for the capital stock of The Northwestern North Carolina Railroad Company, the validity of which is the subject of controversy in this action, were estopped by the recital in the face of the bonds

issued as to the legislation relied upon to authorize the issue of said bonds. And the said J. M. Turner and J. M. Wellborn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board.

ARGUMENT.

In the Supreme Court of North Carolina the defendants there, plaintiffs in error here, ultimately rested their case on an argument and brief submitted by the defendants in the case, "Commissioners of Buncombe v. Payne," which was argued ten days later, and involved substantially the same questions.

The plaintiffs in error contend here, as they insisted below, that the controversy involves the construction of statutes of North Carolina, which the highest court of the State had, either never interpreted when the contract was entered into with the purchasers of the county bonds, or which had been, prior to that time, so construed as to sustain the validity of such a contract. They also contend that the courts can not go behind the ratification of the acts by the signature of the presiding officers of the two Houses of the General Assembly. Further, quoting from the opinion of United States District Judge Purnell, of the Eastern District of North Carolina, "The National Constitution forbids the States to pass a law impairing the obligation of contracts, and that end can be no more accomplished by judicial decision than by legislation."

To sustain the validity of the bonds in question the plaintiffs further rely upon the following acts and facts:

1. The charter of "The Northwestern North Carolina Railroad Company" (ordinance passed by Constitutional Convention of North Carolina, March 9, 1868, which makes the charter of The Atlantic and North Carolina Railroad Company a part of the aforesaid charter, so far as it relates to the subscription of counties to the capital stock of said company).

2. The charter of The Northwestern North Carolina Railroad

Company, confirmed on August 11, 1868, the act confirming said charter being duly ratified by the signature of the presiding officers of both Houses of the General Assembly.

3. Sections of The Code of North Carolina, 1996 to 2000, inclusive, first passed in 1869.

Section 1996 is as follows: "The Boards of Commissioners of the several counties shall have power to subscribe stock to any railroad company, or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest."

The other sections referred to provide how subscriptions shall be made, how elections shall be held, how interest on bonds shall be paid, and how taxes shall be paid.

It is proved, and not controverted, that work was begun on The Northwestern North Carolina Railroad prior to the passage of sections 1996 to 2000, inclusive, of The Code, in 1869, and that at the time said sections became laws, in 1869, said railroad was partially completed and in an unfinished condition. It is also proved, and not controverted, that at the time of the subscription of the bonds in controversy, in 1888, the extension of The Northwestern North Carolina Railroad from Winston to Wilkesboro was in progress of construction, and was not completed. Consequently, the plaintiffs in error claim that said subscription was authorized by said sections after a majority of the qualified voters of Wilkes County had sanctioned the same, as is admitted.

The defendants claim that the plaintiffs in error are estopped from claiming the bonds valid under sections 1996 to 2000 of The Code, inclusive, by reason of the fact that it is recited in the face of said bonds that they are issued under the Act of 1879.

In support of the positions taken by the plaintiffs in error, I shall endeavor to more effectually sustain them by, and may be pardoned for quoting extensively from, the opinions of United States Circuit Judge Simonton, in the case, "W. N. Coler & Co., No. 42, v. The Board of Commissioners of Stanly County, and I. W. Snuggs, Treasurer of said county"; and the opinion of United States District Judge, Purnell, of the Eastern District of North Carolina, in the case, "Union Bank of Richmond,

Va., v. The Board of Commissioners of Oxford," which cases are on all-fours with this. Also, the dissenting opinion of Judge Furches, of the Supreme Court of North Carolina in this very case, concurred in by Chief Justice Faircloth.

I quote from Judge Simonton's opinion in the Stanly County bond case, as follows:

"The case arises in this way. The Yadkin Railroad Company is a corporation created under the law of the State of North Carolina, authorized to construct a railroad from Salisbury south to Norwood, a point in the county of Stanly. The corporation was created by an act of Assembly in 1870, and the charter was amended by an act passed in 1887. Under provisions of the amended act, the county of Stanly was expressly authorized to subscribe to the capital stock of this railroad. The question having been duly submitted to a popular vote of the people of this county, by an overwhelming majority a subscription was authorized of $100,000, to be made in coupon bonds, some in the denomination of $1,000, and some of $500, bearing interest at the rate of 6 per cent per annum, payable on the 1st of July in each year. The County Commissioners, in accordance with this authorized subscription, prepared and issued $100,000 face value of bonds, delivered them to the railroad company, and received certificates of stock to the amount thereof, which certificates are still held for the county. The bonds were placed on the market, and were all sold to bona fide purchasers for value, among others to the Trustees of the University of North Carolina

"Each of these bonds, on its face, declares that it is one of a series issued by authority of an Act of the General Assembly of North Carolina, ratified 3d of March, 1887, and of sections 1996–1998 of The Code of North Carolina, and authorized by a majority vote of the qualified voters of Stanly County, at an election regularly held for that purpose on the 15th of August, 1889, duly ordered by the Board of County Commissioners, issued to pay the subscription made by Stanly County to the capital stock of The Yadkin Railroad Company.

"Under the terms of the act a tax was to be levied each year to pay the coupons on these bonds. In accordance therewith

such tax was duly levied each year for four successive years and the coupons paid from the proceeds thereof. The tax for the fifth year was duly levied and collected, and is in the treasury of the county. The County Commissioners, having become convinced that the bonds were illegally issued, instituted proceedings in a State court of North Carolina against the Treasurer of the county, praying that he be enjoined from paying any more coupons on these bonds. This injunction was thereupon issued by said court on the ground of the invalidity of the bonds to which said coupons belonged, and its action in the premises was confirmed by the Supreme Court of North Carolina."

* * * * * * *

"Before any examination into the merits of this case can be made, two preliminary questions must be met and decided.

"The defendants deny the jurisdiction of this court sitting as a court of equity, because, as they allege, the complainants have a plain, adequate and complete remedy at law.

"They also claim that this court will not go into an investigation of the validity of these bonds and the coupons thereof, because this is a matter already concluded with respect to the identical bonds by the Supreme Court of North Carolina, and is not only res adjudicata, but is the construction of a court of last resort of a State, of its own Constitution and statutes."

* * * * * * *

"The Supreme Court of North Carolina in Commissioners of Stanly County v. Snuggs, 121 N. C., 394, held that the bonds issued by Stanly County in aid of this railroad were void. The ground of the decision was that it did not appear affirmatively upon the Journals of the two Houses that the yeas and nays on the second and third readiing of the bill had been entered upon the Journal, as required by the Constitution. And further, that it is competent to introduce in evidence the Journal of either House of the Legislature in order to show that an act enrolled and ratified was not passed in compliance with the Constitutional requirement."

* * * * * * *

"Is not this case the determination of the court of last re-

sort in North Carolina upon the Constitution and laws of this State, which would be conclusive in this court. This brings up the merits of the case at bar.

"The general rule undoubtedly is as stated in Leiper v. Texas, 139 U. S., 467. 'It must be regarded as settled, that whether statutes of a Legislature of a State have been duly enacted in accordance with the requirements of the Constitution of such State, is not a Federal question, and the decisions of State courts as to what are the laws of the State are binding upon the courts of the United States.'

"But this rule has its modifications when applied to the validity of municipal bonds. This is stated thus: 'As against a party who became the owner of municipal bonds before the decision of the State court invalidating them was rendered, we do not consider ourselves bound by such decision unless we regard it as intrinsically sound. (Enfield v. Jordan, 118 U. S., 680; Bolles v. Brenfield, 120 U. S., 759, quoted and affirmed in Barum v. Oklahoma, 148 U. S., 396.) And the same doctrine is announced and followed in Folsom v. Ninety-six, 159 U. S., 611. (See also Burgess v. Seligman, 104 U. S., 20.)

"There is also another modification of the rule first stated. That when at the date of the issue of municipal bonds the decisions of the court of last resort sustained their validity, bona fide purchasers for value are not affected by subsequent decisions, declaring them invalid.

Anderson v. Santa Anna, 116 U. S., 356.

"What, then, was the law of North Carolina as declared by the court of last resort at the date of the issue of these bonds?

"The bonds were issued in 1890 and then sold on the market. The decision in Commissioners v. Snuggs was in 1897.

"The precise question is this. The Constitution of North Carolina provides that no law shall be passed to raise money on the credit of the State or to pledge the faith of the State directly or indirectly for the payment of any debt or to impose any tax upon the people of the State or to allow counties, cities or towns to do so unless the bill for the purpose shall have been read three several times in each House of the General Assem-

bly, and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal.

Constitution of North Carolina, article 2 section 14.

"Is it incumbent on the bondholder, or is it competent for the county to show by the Journals that no entry of the yeas and nays on the second and third readings was made on such Journal? Or is the enrollment and ratification of the act, and its signature by the presiding officers of the two Houses conclusive proof as of record that all the requirements of the Constitution were complied with, so conclusive as to preclude further inquiry? It is admitted that in the case at bar there was no such entry on the Journal.

"A question somewhat similar to this came up in Broadnax v. Groom, 64 N. C., 244.

"The Constitution of North Carolina, article 2, section 12, provides that the General Assembly shall not pass any private law unless it shall be made to appear thirty days' notice of application for such a law shall have been given under such direction and in such manner as shall be provided by law. In this case the objection was made to an act that the thirty days' notice had not been given.

"Pearson, C. J., delivering the opinion of the court, says: 'We do not think it necessary to enter into the question whether this is a public or local act or a mere private act, in regard to which thirty days' notice of the application must be given, for, taking it to be a mere private act, we are of the opinion that the ratification, certified by the Lieutenant-Governor and the Speaker of the House, makes it a matter of record which can not be impeached before the courts in a collateral way. A record until reversed importeth verity. * * * The courts must act on the maxim omnia presumantur.' It will be noticed that the Constitution in this regard does not prescribe any fixed mode in which the notice must be shown.

"In Scraborough v. Robinson, 81 N. C., 304, the question was discussed. In that case it appeared that an act of the Leg-

islature had gone through every stage required by the Constitution, had been voted upon on its second and third readings, by the yeas and nays, and these had been entered upon the Journal. It had been duly enrolled for ratification and the Journals stated that it had been duly ratified. But upon examination of it in the office of the Secretary of State, it showed an absence of the signatures of the presiding officers of the two Houses. An effort was made to declare it the law, notwithstanding this omission. Chief Justice Smith, delivering the opinion of the court, clearly expresses his opinion that the certificate and signatures of the presiding officers make a record which can not be assailed. He quotes with approval Pacific Railroad Company v. Governor, 23 Mo., 353, which lays down this doctrine and denies to the court the power to declare invalid an act which in its terms is not contrary to the Constitution, on its face is regular, where resort must be had to something behind the law itself in order to ascertain whether the Legislature, in making the law, was governed by the rules prescribed for its action by the Constitution. He also quotes with approval Pangborne v. Young, 32 N. J. Law, 29, followed in Nevada v. Swift, 10 Nevada, 176, in which the doctrine is broadly stated that a bill attested by the presiding officers is inclusive proof of the enactment and contents of a statute and can not be contradicted by the legislative journals or in any other way. But this expression of opinion by this learned Chief Justice is declared by himself to be obiter dictum. He expressly limits the decision of the court to the absolute necessity of the signatures of the presiding officers of the Enrollment Act, because it was one of the essential requirements of the Constitution. Such were the decisions of the Supreme Court of North Carolina, before and at the date of the issue of these bonds."

"Subsequent decisions of this same court throw some light upon those quoted. In Carr v. Coke, 116 N. C., 223, among the published acts appeared one of which the Journal did not show that it had been read three times in both Houses, as required by the Constitution (art. ...., sec. 23). It had, however, been duly ratified. The court held, with a strong dissent

of two of its members, that when it appears that a bill has been duly signed by the presiding officers of the two Houses of the General Assembly, declaring it to have been read three times, in each House, the courts can not go behind such ratification to inquire whether it was fraudulently or erroneously enrolled before it had been passed after the requisite readings by each House, although the Journals do not show that it was so passed. Faircloth, C. J., wrote the opinion of the court and rested on the doctrine announced in Broadnax v. Groom, supra. Here it will also be noticed that the Constitution does not prescribe that the fact of three readings must be entered upon the Journals. The next is the case of the Commissioners v. Snuggs, above quoted, declaring these bonds invalid, after admitting the evidence of the Journals.

"The only decision upon the validity of municipal bonds is this last. So, when these bonds were issued, the purchaser, upon making the inquiry, as he was bound to do, did not have direct authority for believing the act Constitutional. He was governed by reasoning from authority in similar cases. This court, therefore, has the right to form its own judgment upon the matter."

"The general principle laid down by Pearson, C. J., in Broadnax v. Groom, and approved by his learned successors, Chief Justices Smith and Faircloth, has met the approval of and has been ably sustained in many States of this Union. In others it has been disputed and the contrary conclusion reached. The conflicting cases are quoted in Marshall, Field & Co. v. Clark, 143 U. S., 661, and many of them commented on in an able opinion in State v. Jones, Lawyers' Reports on Book 23 (1894), page 340."

"The question is one of power. Had the county of Stanly, under the Act of 1870-'71, power to make this subscription in bonds and to levy the tax consequent thereon? Or, perhaps, the question can be put in this way: Was the act passed by the General Assembly in the lawful exercise of the power given to it by the Constitution of the State?"

"It goes without saying that the Legislatures of the several States of the Union have full legislative power, limited only by

express provisions of the Constitution. And one of the legislative powers is the levying of a tax for such purposes as the Legislature deems public in their character, among which all the States recognize subscriptions in aid of railroads."

* * * * * * *

United States District Judge Purnell, of the Eastern District of North Carolina, in his decision in the case, "Union Bank of Richmond, Va., v. The Board of Commissioners of Oxford," says as follows:

"The facts agreed present the following case: The town of Oxford was a duly chartered municipal corporation under the laws of North Carolina, authorized to sue and be sued, etc., as 'The Board of Commissioners of Oxford.' In 1891 the General Assembly of North Carolina passed an act to incorporate The Oxford and Coast Line Railroad Company, which act passed the Senate in compliance with the requirements of the Constitution; but in the House, it appears by the Journal, the bill passed its second and third readings on the same day and the ayes and nays were not entered on the Journal on either reading. This admission is made with the right reserved to the plaintiff of objecting thereto, unless that the court should decide such impeaching testimony is admissible under the circumstances of this case. An election was held under the act (about which no question was raised), at which a majority of the qualified voters voted for a corporation subscription of $40,000 of the capital stock of the railroad company, and bonds to that amount were duly issued."

* * * * * * *

"The defendants rest their case upon the ground that the Supreme Court of North Carolina, in a case between the same parties, reported in 119 N. C., 264, September Term, 1896, has decided these bonds invalid because of a failure in the House of Representatives to observe the requirements of article 2, section 14, of the State Constitution, the matters involved are res judicata, and the Federal courts will respect the opinion of the State Court."

* * * * * * *

"The question next arises is this one of those cases in which

a Federal Court should be governed by an opinion delivered by the Supreme Court of a State."

"Where there is a well-settled rule of property in a State or a well-settled line of decisions as to any matter of State law, or the construction of State statutes or State Constitutions, the courts of the United States will always respect these decisions and be governed by them. 'It is a settled rule of these courts,' as said Justice Swayne in delivering the opinion of the court in Gelpoke v. Dubuque, 1 Wall., 175, 'in such cases to follow the decisions of the State courts. But there have been heretofore, as there will, doubtless, be hereafter, may exceptional cases. We shall never immolate truth, justice and the law because a State tribunal has erected the altar and decreed the victim.' The question involved in this case is the validity of certain bonds which the Supreme Court of North Carolina in a former decision in this identical case (116 N. C., 339), held to be valid in all essential particulars, and belongs to the domain of general jurisprudence. In this class of cases the Supreme Court of the United States, in Pine Grove Township v. Talcott, 19 Wal., 661, says: 'The United States courts are not bound by the judgments of the courts of a State where the case arises.' The National Constitution forbids the States to pass laws impairing the obligation of contracts, and that end can be accomplished no more by judicial decision than by legislation. Were these courts to yield in cases like this of oscillating opinions, or even decisions of the courts of the respective States, they would abdicate the performance of one of the most important duties with which they are charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The authorities to this effect are numerous and uniform."

"And in most of the cases cited there was a final judgment in the State Court and the matter was res judicata as far as they could make it so." "In questions belonging to the domain of general jurisprudence where commercial securities and contracts between citizens of different States are involved, the jurisdiction of the courts of the United States is absolute when sought, and these courts must hear and determine such questions independent of the tribunals of the

State in which they arise. If this be so when there is a final judgment, the mere publication of an opinion by a State Court in a cause where there is no final judgment will not bind the United States courts or oust them of their jurisdiction."

"So when a question falling under the laws or Constitution of the United States—a Federal question—is presented, the United States courts have a clear jurisdiction and would fail in the purpose for which they were created if they did not take jurisdiction, even though their decisions conflict with that of the State Court. My conclusion is, that there is nothing in the facts agreed to prevent this court hearing and determining the questions involved."

"It is well settled that the laws which are in force at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of the contract as much as though they were incorporated in its items. This principle embraces the acts which effect its validity, construction, discharge and enforcement or the remedies under the contract. Von Hoffman v. The City of Quincy, 4 Wal. 535; Walker v. Whitehead, 16 Wal. 314; Edwards v. Kersey, 96 U. S., 595; Barnitz v. Beverly, 163 U. S., 118. And this means that the law as understood and construed by the courts where the contract is made and to be performed enters into the contract. Chief Justice Taney, in delivering the opinion of the court in Ohio L. & T. Co. v. Debolt, 16 Howard, 432, says: 'Indeed the duty imposed upon this court to enforce contracts honestly and legally made, would be vain and nugatory, if we were bound to follow these changes in judicial decisions which the lapse of time, and the change in judicial officers, will often produce, and the sound and true rule is, that if the contract when made was valid by the laws of a State, as then expounded by all the departments of its government, and administered by its courts of justice, its validity and obligation can not be impaired by any subsequent act of the Legislature, or decisions of its courts, altering the construction of the law.' Justice Harlan, delivering the opinion in Taylor v. Ypsilanti, 15 Otto, 71, quoting the above opinion with approval, says that this doctrine is no longer open to question in this court. 'It has been recognized for more than a quarter of a century and is an established exception to the general rule that the Federal courts will accept or adopt the construction which the State courts give to their own Constitution and laws.' Several opinions are cited sustaining the view that the

construction of the State statute as far as contract rights acquired under it are concerned becomes as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment to the law by means of a legislative enactment and the rights of the parties are to be determined according to the law as it is judicially construed to be when the bonds in question were put on the market as commercial paper."

"Under this principle it becomes of vital importance to know what was the law in North Carolina as enunciated by the highest court of the State at the time the contract under consideration was entered into in 1891, or what was the law of the State effecting such commercial paper in 1892, when the bonds were issued and sold to the plaintiff on the market in another State."

"It is admitted in the facts agreed that the Journal of the House of Representatives shows a failure to comply with Article 2, section 14, of the Constitution, but it is understood and agreed that this admission, as to what appears on the Journal, is only to be considered should the court decide that such impeaching testimony is admissible under the circumstances of this case."

"There was apparently both legislative and judicial authority, ample and complete, for the issue of the bonds in question, and the Supreme Court of the State, (116 N. C., 339), in a learned opinion decided all essential matters in favor of the validity of the bonds. As far as it goes the law of North Carolina, as understood by the courts and the legal profession, is embodied in that opinion. The act of the Legislature and other questions decided therein give validity to the bonds as set forth in the face of the bonds themselves—the legislative and judicial authority to issue such bonds. The purchaser, of course, should enquire into the power to issue bonds. He saw this set forth in the face of the bond itself, and if he enquired further or verified the record either personally or through an attorney learned in the law, neither would have been wiser or more learned than the Supreme Court of the State, which court at February Term, 1895, decided in favor of the validity of these bonds. If such purchaser or his attorney examined the act of the Legislature he found it certified to as required by the law of North Carolina and published in the volume of the public laws. Was it incumbent on him to look further?"

"In the same volume, 116 N. C., 223, (Carr v. Coke) in a case where it was alleged and offered to be proved by the Journals and other evidence, that an act of the Legislature had passed neither House of the General Assembly, but had been certified by the presiding officers, the Supreme Court of North Carolina held, emphasizing the line of decisions by that court, that 'where it appears that a bill has been duly signed by the presiding officers of the two Houses of the General Assembly the courts can not go behind such ratification to enquire whether it was fraudulently or erroneously enrolled before it had passed the requisite reading by each House.' A more extreme case can hardly be imagined—where the certificate of the presiding officers made law, affecting the commercial interests of the State, a bill which had not passed either House. The decision though was in conformity with what was said by Chief Justice Pearson, speaking for the court in Broadnax v. Groom, 64 N. C., 244, 'that the ratification certified by the Lieutenant-Governor and the Speaker of the House of Representatives makes it a matter of record which can not be impeached before the courts in a collateral way.' To the same effect is Gatling v. Tarboro, 78 N. C., 119, decided in 1878, and other decisions to the same effect. The judges recognized the gravity of the question in Carr v. Coke, and there were two dissenting opinions in which the distinction was drawn between a collateral and a direct attack upon the record, but the majority of the court decided the law as it has always been understood. The courts of the State, have adopted the English rule, and acted on the maxim, 'omnia præ sumuntur rite esse acta,' and that more importance is to be attached to the acts of the Lieutenant-Governor, the second highest officer of the State elected by the people, as presiding officer of the Senate, and Speaker of the House of Representatives, than to those of the Journal Clerk, irresponsible, and with much less at stake in his official acts. At the time these bonds were issued the law of North Carolina, as construed by the courts of the State, based both upon the ground of public policy and upon the ancient and well-settled rule of law, (whatever changes may have taken place since the judicial decision, which can only govern for the future,) was, that the copy of an act attested according to law by the presiding officers of the two Houses of the Legislature, and filed in the office of the Secretary of State, is conclusive proof of the enactment, and the contents of the statute of the State, and that such

attested copy can not be contradicted by the legislative journals, or in any other manner."

"This being the law at the time and the place where the contract embodied in the bond was entered into, the defendants are not entitled to the impeaching testimony embodied in the Journal of the House of Representatives; and the act of the Legislature under which the election was held, and the bonds issued, must be held to have been passed with all the solemnity and formality requisite to a valid act of the General Assembly of North Carolina; and the bonds issued in pursuance of such act are valid and binding upon the defendants in the cause. To hold otherwise would be to impair by judicial decision the obligation of a contract made in compliance with the law, which the Constitution of the United States does not permit."

* * * *

The following is the dissenting opinion of Judge Furches, of the Supreme Court of North Carolina, in this identical case, which opinion is concurred in by Chief Justice Faircloth. Speaking of the decision of the court, written by Judge Douglas, Judge Furches says:

"I understand the court to rest its opinion on two grounds—the want of power in the Commissioners to submit the proposition to the voters and to issue the bonds; and the doctrine of estoppel. If there is error in these positions, I shall contend that the conclusion to which the court has arrived is erroneous and should be reversed. I admit that, if the Commissioners had no legislative authority to submit the proposition of subscription to the voters of Wilkes these bonds are void, and the judgment of the court is correct. But I propose to show that they had this authority, and that the bonds are valid.

"The charter (the ordinance of the convention) in express terms makes the charter of The Atlantic and North Carolina Railroad Company a part of the charter of The Northwestern North Carolina Railroad Company, so far as it relates to the subscription of counties to the capital stock of the company. being so, the charter of The Atlantic and North Carolina Railroad Company is to be read and considered as a part of the charter of The Northwestern North Carolina Railroad Company.

Range Co. v. Carver, 118 N. C., 328, 24 S. E., 352.
Commissioners v. Higginbotham, 17 Kansas, 62.

"It is like an instrument referring to another instrument (Flaum v. Wallace, 103 N. C., 296, 9 S. E., 567), or where the complaint in one action refers to the complaint in another action for data (Alexander v. Norwood, 118 N. C., 381, 24 S. E., 119); they are to be read and considered together as one instrument. I have shown that the subscription made to this company (The Northwestern North Carolina Railroad Company) by the county of Forsyth, under the charter as originally passed, has been sustained, and held to be valid by this court in Hill v. Commissioners, supra. This decision established the power—the authority—to submit the proposition of subscription to the voters of the county, and to issue bonds. But the validity of the bonds issued on this subscription of Forsyth was again put directly in issue in the case of Belo v. Commissioners, in a mandamus proceeding to compel their payment, and their legality was again sustained by this court.

Belo v. Commissioners, 76 N. C., 489.

"This case, also, as I contend, established the authority to submit the question to the voters, and to issue these bonds. It is true that the submission of this question in Forsyth was made by the Justices of the Peace, acting as a County Court; and it is true that the charter provides that the question should be submitted by them. But this charter was passed, and this submission was made, and bonds issued, before the adoption of the Constitution of 1868, which did not go into effect until the 24th of April of that year. By this constitution and subsequent legislation the County Court was abolished, and the County Commissioners succeeded to their powers in this matter and in all such cases. It is so held by this court in Belo v. Commissioners, supra, and it is expressly so provided by the Legislature. Code, section 1997. Therefore, while the submission of the question in Wilkes was by the Commissioners, they were the successors of the Justices and the County Court, fully and clearly authorized to make the submission and the subscription and to issue the bonds.

"But it is contended by the court that, if the charter authorized this subscription and the issue of the bonds now sought to be repudiated, it was passed before the Constitution of 1868 went into effect, and that it was thereby repealed. To support this position, Aspinwall v. Commissioners, 22 How. 364, and Lewis v. Pima Co., 155 U. S. 54, 15 Sup. Ct. 22, are cited by the court. Neither of these cases,

in my opinion, sustains the position for which they are cited. The first case cited (22 How.) is intended to raise the question of violating a contract under the Constitution of the United States, and nothing more. The submission in that case was made, and the vote thereon was had, in 1849; but the subscription to the capital stock was not made, and the bonds were not issued, until 1852. In the meantime the Constitution of the State (Indiana) had been amended so as to prohibit any county in the State from issuing such bonds. But Daviess County proceeded to issue the bonds under said submission and vote, and to put them on the market, but afterwards refused to pay them; and the plaintiff, being the holder of a part of these bonds, undertook to enforce their payment. There was no question made in that case but what the Constitution had inhibited their issue. But the plaintiff claimed that the submission and the vote thereon, which were before the amended Constitution, amounted to a contract; and that the new Constitution, which prohibited the county from issuing the bonds, was an impairment of the obligation of this contract, and therefore in violation of the Constitution of the United States. No such question as this arises in this case. There is no pretense that these bonds are protected by any provision of the Constitution of the United States.

"But it is denied by the defendants that the Constitution of 1868 repealed the charter of this road, or that it prohibited Wilkes County from making this subscription or from issuing these bonds, as I expect to show. The case of Lewis v. Pima Co. arose out of the legislation of Arizona Territory. The Legislature of this Territory passed an act authorizing Pima County to issue bonds for the construction of a railroad. This being a Territorial government, it had no legislative powers except those granted by Congress. And it was held in that case that Congress had not only failed to grant such legislative power, but had in express terms prohibited its exercise, and the bonds were held to be void. I fail to see the argument to be drawn from this case against the validity of the bonds under consideration. As has been stated, the charter of The Northwestern North Carolina Railroad was passed before the adoption of the Constitution of 1868, which took effect on the 22d of April of that year. But the Legislature passed an act, ratified on the 11th of August, 1868, as follows: 'Sec. 1. The General Assembly of North Carolina do enact, that an ordinance entitled "An ordinance to incorporate The Northwestern

North Carolina Railroad Company," ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified and confirmed.' If there had been a repeal of this charter by the Constitution, which I contend there had not been, it seems to have been expressly re enacted in August, 1868. It has not escaped my attention that there is in the printed record an agreement as to what acts are to be considered by the court in deciding this case, and the Act of 1868 is not one of those named. This agreement is signed by the counsel for plaintiffs, and by counsel for Mr. Turner and Mr. Wellborn, but it is not signed by any one for the defendant Call. But, if it had been signed by Call, I would have to disregard it. Parties may agree upon facts, that I would feel bound by, but I can not feel bound by an agreement as to what is the law. I refer to this Act of 1868 for the purpose of meeting an argument in the opinion of the court, and not for the reason that I consider it necessary to sustain the position I have taken, as to the authority of the Commissioners of Wilkes County to submit this question to the voters, and to subscribe the stock, and to issue the bonds. The charter provides for submitting the question to a vote of the people in almost, if not, the language of the Constitution of 1868, with the single exception that it shall be sufficient if a majority of the qualified voters 'voting thereon shall be in favor of the subscription.' To this extent, and no further, did the Constitution of 1868 conflict with the provisions of this charter; and this was cured by section 1997 of The Code, which was admitted to have been passed as the Constitution requires, and which provides that it shall take a majority of the qualified voters of the county to authorize the subscription, as was done in this case. Suppose that section 1997 of The Code had been passed by the Legislature, as an amendment to this charter, with all the formalities and requirements of the Constitution; would it be contended that the submission was without legislative authority, and that these bonds were void? And, if not, why is it that a general law, applying to all cases of submission, has not the same effect?

"The next ground upon which the court rests its opinion is that of estoppel. This ground of alleged invalidity to the bonds arises in this way: The Legislature, at its February session (1879), attempted to pass, and did pass, an act providing for the extension of The Northwestern North Carolina Railroad from Winston to Wilkesboro, for

the subscription of counties to its capital stock, and the issues of bonds. But it is claimed by the plaintiff, and such appears to be the fact, that this act did not receive the three several readings, on three several days, with a call of the yeas and nays, as provided by the Constitution, and, for that reason, that the said act is void, under Union Bank of Richmond v. Commissioners of Town of Oxford, 119 N. C., 214, 25 S. E. 966, and Commissioners v. Snuggs, 121 N. C., 400, 28 S. E., 539. But the Commissioners, when they issued these bonds, did not know that this act was unconstitutional and void, and they recited in the bonds that they were issued under the Act of 1879. This act does not purport to be an original act, but it is stated in the act itself that it is an amendment to the ordinance of the Convention chartering said road. So that anyone seeing these bonds would be led by the statements therein to know that they depended upon authority derived from the original charter, that is, the ordinance of the Convention of 1868. And it is claimed in the opinion of the court that this recital in the bonds, put there by the plaintiffs, estops the holders and those representing them from showing any other authority in the Commissioners, except the Act of the 20th of February, 1879, and that, that act being void for the reasons heretofore stated, the Commissioners had no power to issue the bonds. I admit that this act is a nullity, and can not benefit the bondholders; and as it is void, and can do them no good, it can do them no harm. The court therefore, upon this recital in the bonds that they were issued under the Act of February 20, 1879, again rests its judgment upon the doctrine of estoppel, and holds that the bondholders and the defendants in this action are estopped to show that the Commissioners had any other authority except the said act of 1879.

"With the greatest respect and deference to the opinion of the court, it seems to me that the doctrine of estoppel is not only misapplied, but that its use and purpose are misconceived in this application by the court. Estoppels are as to facts, and not of law. In such transactions as this, they are made to apply to a party stating the facts, and not to the party to whom they are stated. This seems to me to be elementary learning. But see Bigelow, Estop., pp. 4–7, and 356, and note 1: It is not the deed of the defendant, but of Isham (the grantor) only, by whom alone it is executed; and not being the deed of the defendant, it can not, as a deed, estop him from denying that the grantor had title. And the same principle is held in the case

of Northern Bank of Toledo v. Porter Tp. Trustees, 110 U. S., 608, 4 Sup. Ct., 254, near the end of the opinion (cited by the court). In that case the bondholder was trying to estop the maker by holding him to the statements in the bond; and the court says that the maker is estopped by the recital of such facts as it was supposed to have special knowledge of—such as that there had been a submission to a vote, and that a majority of the qualified voters voted for the bonds. But it was held that the defendant (the maker) was not estopped to show the law—to show that the township had no legal authority to make the subscription and to issue the bonds. If the maker of the bonds was not estopped by the recitals in the bond from showing the want of legal authority to make the bonds, what rule of law or justice is there to estop the defendants in this case from showing that the Commissioners of Wilkes County had the power—legal authority—to issue these bonds? It is said in the opinion of the court that 'estoppels are mutual,' and, as the plaintiff would be estopped by the recitals, that the defendant must be. This rule obtains in many instances, but I deny its application in this case, as I have shown above, from Bigelow on Estoppel and from Northern Bank of Toledo v. Porter Tp. Trustees. But were I to admit the rule to be that, where one party is estopped, the other party is also, what would be the result of the reasoning of the court, when I have shown that the maker would not be estopped to show the want of power?"

* * * * * * * * * * *

Faircloth, C. J.: "I concur in the dissenting opinion."

I think the dissenting opinion of Judge Furches clearly establishes the fact that the bondholders are not estopped from claiming that the subscription to the capital stock of The Northwestern North Carolina Railroad, by the Commissioners of Wilkes County, and the bonds issued in payment thereof, were authorized by sections 1996 to 2000, inclusive, of The Code. It is admitted that these sections when first enacted, in 1869, were enacted in strict compliance with the requirements of the Constitution, and when re-enacted in The Code, 1883, the Court says: "All the sections of The Code were enacted by the General Assembly, having passed three several readings on three different days in either House, the yeas and nays on the second and third readings having been entered on the Journals of both Houses respectively."

Commissioners v. Snuggs, 121 N. C., 401.

In this case there is no question as to the regularity of all the details of subscription, vote and tax. The question is, was the subscription made and bonds issued "to aid in the completion of any railroad in which the county might have an interest"?

As before stated, work had begun on The Northwestern North Carolina Railroad prior to the passage of these sections in 1869; and, when this subscription was made in 1888, work on the extension to Wilkesboro had been in progress for over a year, and the road was uncompleted.

The only question remaining is, did citizens of the county "have an interest," as contemplated by the statute? Discussing this, in the Stanly County bond case, Judge Simonton says:

"To aid in building a railroad is a public purpose, and for the general welfare of the ordinary municipal corporations, such as counties, cities and towns, through which the road is to pass, and so is a corporate purpose. (Livingston County v. Darlington, 101 U.S., 407; Bolls v. Brimfield, 120 U. S., 759; Brown v. Hartford Commissioners, 100 N. C., 92)

"The public policy of all the States of the Union, notably North Carolina, recognize that railroads are of great public concern, and a great public benefit. None of these States have have shown this in a more marked degree than the State of North Carolina, which has expended vast sums in opening up the magnificent system of these public highways, developing every section of the State. It is evident, therefore, that in this Yadkin Railroad the citizens of the county of Stanly had an interest of a valuable and important character."

The interest of the citizens of Wilkes in The Northwestern North Carolina Railroad, when the subscription to the capital stock was made in 1888, I contend, was direct and pecuniary. In 1887 the Commissioners of Wilkes County had subscribed $100,000 to the capital stock of this road, if completed by a certain time in 1899, to, or near Wilkesboro. A majority of the qualified voters of said county had ratified said subscription. Technically and legally this subscription was in force in 1888, when second subscription was made, and it had not been declared invalid by any court of law. To this extent the citizens had a direct pecuniary interest, and, if the bondholders are not estopped from pleading it, the subscription and bonds were authorized by the aforesaid sections of The Code.

RICHARD N. HACKETT,
Counsel for Plaintiffs in Error.

Office Supreme Court U. S.
FILED
FEB 20 1899
JAMES H. McKENNEY,
Clerk

No. 642.

642

Stipulation as to notice &c.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

Filed Feb. 20, 1899.

J. M. TURNER AND J. M. WELBURN, PLAINTIFFS IN ERROR,

VERSUS

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND C. C. WRIGHT, DEFENDANTS.

In Error to the Supreme Court of the State of North Carolina.

STIPULATION TO WAIVE NOTICE OF THE MOTION OF DEFENDANTS TO AFFIRM AND DISMISS, AND THAT THIS CAUSE BE SUBMITTED ON SAID MOTION UPON THE ARGUMENTS ALREADY FILED BY COUNSEL.

The undersigned, counsel for plaintiffs in error, and for defendants, hereby stipulate and agree that the motion of defendants to advance, affirm and dismiss shall be heard on ~~March 25~~ A. D., 1899, counsel for plaintiffs in error hereby waiving the notice of three weeks prescribed by the rule of the Supreme Court, and consenting that said motion shall be submitted by counsel for defendants in the absence of counsel for plaintiffs in error.

It is further stipulated and agreed, that this cause be submitted on printed arguments, which will be filed by the undersigned before the said 20th day of ~~March.~~ February

RICHARD N. HACKETT,
Solicitor for Plaintiffs in Error.

A. C. AVERY,
Solicitor for Defendants.

FEB 20 1899
JAMES H. McKENNEY,
Clerk.

No. 642.

642

Motion Papers.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

Filed Feb. 20, 1899.

J. M. TURNER AND J. M. WELBURN, PLAINTIFFS IN ERROR,

VERSUS

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND C. C. WRIGHT, DEFENDANTS.

In Error to the Supreme Court of the State of North Carolina.

MOTION TO DISMISS AND AFFIRM.

Comes now the appellee, by his counsel, appearing in that behalf, and moves the Court to advance for hearing and to dismiss the appeal in the above-entitled cause for want of jurisdiction, because the judgment or decree from which the said appeal purports to have been taken is the judgment or decree of the Supreme Court of one of the United States, to-wit, the Supreme Court of the State of North Carolina.

And the said defendants, by counsel as aforesaid, also moves the Court to affirm the said judgment or decree from which said appeal purports to have been taken, because, although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said appeal was taken for delay only.

A. C. AVERY,

Counsel for Defendants for the Purposes of these Motions.

FILED
FEB 13 1899
JAMES H. McKENNEY,
Clerk

No. 642.

Brief of Avery for D. C.

Filed Feb. 13, 1899.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

J. M. TURNER AND J. M. WELBURN, PLAINTIFFS IN ERROR,

VERSUS

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND C. C. WRIGHT, DEFENDANTS.

In Error to the Supreme Court of the State of North Carolina.

Argument of A. C. AVERY, Attorney for Defendants.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

J. M. TURNER AND J. M. WELBURN, PLAINTIFFS IN ERROR,

VERSUS

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND C. C. WRIGHT, DEFENDANTS.

In Error to the Supreme Court of the State of North Carolina.

Argument of A. C. AVERY, Attorney for Defendants.

The action was originally brought in the Superior Court of Wilkes County, North Carolina, by the defendants, the Board of Commissioners of Wilkes County, and C. C. Wright, a taxpayer of said county, against Clarence Call, Treasurer of said county. The relief prayed for was that the said Call should be enjoined and restrained from paying the interest on certain bonds, issued by said county in payment of a subscription to the capital stock of The Northwestern North Carolina Railroad Company, and that the said bonds should be declared invalid, for want of authority in the Board of Commissioners to make the subscription or create the bonded debt.

The plaintiffs in said action, the defendants here, allege and attempted to show, that the bonds were issued without lawful authority, because the statutes purporting to authorize the creation of the bonded debt, were not enacted in accordance with the requirements of the Constitution of the State of North Carolina.

STATUTES RELIED ON AS AUTHORITY FOR CREATING THE BONDED DEBT.

The plaintiffs in error relied, in order to show authority in the constituted authorities of Wilkes County to issue the bonds, on the following statutory provision:

1. The amendment to the charter, recited in the face of the bonds as authority for issuing it (sec. 4, chap. 43, Laws of 1879), which it was admitted failed to pass both Houses of the Legislature as required by section 14, article 2 of the Constitution, which is hereinafter fully set out; and chapter 156, section 4 of the Laws of North Carolina of 1881, which will be hereafter fully set forth, and which, as was also proven and admitted, was not enacted in accordance with the requirements of section 14, article 2.

2. Sections 1996 to 2000 of The Code of North Carolina, which were originally enacted in 1868, and which sections were admitted to have been reenacted as a part of The Code in 1883 in the manner prescribed by the Constitution.

3. Upon the ordinance of the Constitutional Convention of 1868, chapter 17, page 57, sections 2 and 12, which was enacted before the ratification of the Constitution of 1868, on the 24th of April, 1868; and Justice Furches, in his dissenting opinion, relied on an amendment thereto, ratified on the 11th of August, 1868, which is published as sections 1, 2 and 3 of chapter ..., of the Private Laws of the Special Session of 1868, which last-named amendment it is admitted by counsel in an agreement hereinafter set forth, did not pass in accordance with the requirements of said section of the Constitution, which had been previously ratified on said 24th day of April, 1868. For the reason that it had not passed as required and therefore, if in evidence, raised the same question involved in the consideration of the amendment of 1879 and 1881, counsel had agreed the Act of August 11 should not be considered. See agreement of counsel in printed record.

All of the statutory provisions relied upon to empower the Commissioners of Wilkes County to pay its bonded debt, will be set forth in full in the discussion of the assignments of error, which refer to each particular act.

The county of Wilkes issued, on October 1, 1889, one hundred bonds of the denomination of $1,000 each, each bond reciting upon its face as authority for issuing it section 4, of chapter 43, Laws of North Carolina, of 1879. See opinion of Douglas, J., 31 S. E. Rep. (No. 10), page 481.

The material portion of section 4 is as follows:

"Sec. 4. That any township or city, town, county, or other municipal corporation of this State, shall have power and authority to subscribe for and take any number of shares of capital stock of said company that a majority of the voters of such township or city, town, county, or other municipal corporation may elect to take therein."

It was proven and admitted that the statute (chap. 43, Laws of 1879) was not passed by both Houses of the General Assembly in accordance with the requirements of section 14, article 2, of the Constitution of North Carolina, which is as follows:

Article 2, section 14: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each House respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal."

Another pertinent provision of the Constitution is article 7, section 7, which is as follows:

"No county, city, town, or other municipal corporation shall contract any debt, pledge its faith, or loan its credit, nor shall any tax be levied or collected by any officers of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

It is not denied that two elections were held in the years 1887 and 1888, (see printed record, pp. . . .), and that it was ascertained and declared by the proper officers that a majority of

the qualified voters of Wilkes County had voted in favor of the subscription, and that the bonds were subsequently issued on October 1, 1889.

ARGUMENT.

SECOND ASSIGNMENT OF ERROR.

It seems that the question involved in this controversy can be more clearly presented by first considering the second assignment of error in connection with the fourth. The second assignment is:

"That the Court erred in holding that the subscription of $100,000 to the capital stock of The Northwestern North Carolina Railroad Company by the Board of Commissioners of Wilkes County was not authorized by the amendments to the charter of the said Northwestern North Carolina Railroad Company, enacted after the year 1868. And the said J. M. Turner and J. M. Welburn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section, by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board."

The pertinent portions of article 2 of the Constitution are:

"Sec. 14. No law shall be passed * * * to impose any tax upon the people of the State or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have * * passed three several readings, on three different days and unless the ayes and nays on the second and third reading of the bill shall have been entered on the Journal."

"Sec. 16. Each House shall keep a Journal of its proceedings; it shall be printed and made public immediately after the adjournment of the General Assembly."

The Constitution of Illinois contained similar, in fact almost identical, provisions, as follows:

"Sec. 3. Each House shall keep a Journal of its proceedings and publish them," etc.

"Sec. 21. * * * on the final passage of all bills, the vote shall be by ayes and noes, and shall be entered upon the Journals, and no bill shall become a law without the concurrence of a majority of all the members-elect in each House."

It is difficult to distinguish the meaning of the words "no bill shall become a law" and the language used in the other case "no law shall be passed." So the only material difference between the provisions of the two Constitutions is that the North Carolina law is more stringent in requiring the passage of the law with the same formalities on both the second and third readings in each House.

South Ottawa v. Perkins, and
Supervisors v. Post, 94 U. S., 260.

"It is declared by the Judiciary Act as a fundamental principle 'That the laws of the several States, except where the Constitution, treaties or statutes, of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply.'

1 Stat. at L., 73, sec. 34.

"And this court has always held that the laws of the States are to receive their authoritative construction from the State courts, except where the Federal Constitution and laws are concerned; and the State Constitutions, in like manner, are to be construed as the State courts construe them. This has so often been laid down as the proper rule, and is in itself so obviously correct, that it is unnecessary to refer to the authorities."

"If, therefore, the law in question *had never been passed upon* by the *State courts*, the courts of the United States would, *nevertheless, be bound* to give to the *Constitution of Illinois the same construction which the State courts give to it*, and to hold a *pretended* act of the Legislature *void* and not *a law which the State courts would hold to be so.* Otherwise, we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As

a matter of propriety and right, the decision of the State courts on the question as to what are the laws of the State is binding upon those of the United States."

South Ottawa v. Perkins, supra.

"If, for instance, the Supreme Court of a State should hold that an act appearing on her statute books was *never passed and never became a law, the Federal Court could not disregard the decision and declare that it was a law and enforce it as such.*"

Norton v. Shelby County, 118 U. S., 425.

To sustain the foregoing proposition, Justice Fields cites South Ottawa v. Perkins, and Post v. Supervisors, supra.

"Upon this point there seems to be a settled course of decisions in the highest court of Kentucky; and upon such a subject as the organization or composition of a tribunal established by the fundamental law of the State, those decisions are at least entitled to great weight."

Merriweather v. Muhlenburg County Court, 120 U. S., 354.

The case of Rich v. Mentz, 134 U. S., 632, depended upon the question whether the requirement of a statute that a petition should state that the petitioners were a majority of the taxpayers of a town was mandatory, and a compliance with it was condition precedent to the acquisition by a town of authority to issue the bonds in aid of a railroad company, or whether, in the absence of such statement in petition, it was sufficient that the county Judge to adjudicate that a petition wanting in these prerequisites was sufficient. The Chief Justice, speaking for the court, said: "These views are in accordance with the repeated adjudications of the Court of Appeal of the State of New York, construing this statute; and upon question of this character, when arising as here, the decisions of the highest judicial tribunal of the State are entitled to great and *ordinarily decisive* weight."

The case of Merriweather v. Muhlenburg, supra, was cited

in Bullet County v. Washer, 130 U. S., 142, and the ruling of the Supreme Court of Kentucky was again followed.

It is conceded by Judge Simonton in his opinion in Coler v. Commissioners of Stanly County, et al., 89 Fed R., 257, that section 14, article 2, of the Constitution of North Carolina is so plainly mandatory in its requirements as to make it obligatory upon the Federal Court to pronounce any statute not passed in pursuance of its requirements unconstitutional and void.

In this case it may be said, as was said by Chief Justice Fuller in Rich v. Mentz, supra, that the rule has been definitely settled by repeated adjudications of the Supreme Court of North Carolina.

The cases are the following:

Bank v. Commissioners, 119 N. C., 214.
Commissioners v. Snuggs, 121 N. C., 394.
City of Charlotte v. Shepperd, 120 N. C., 411.
Id., 122 N. C., 602.
Rodman v. Town of Washington, 122 N. C., 39.
Board of Commissioners v. Call, 31 S. E. R., 481.
Commissioners of Buncombe v. Payne, not yet reported, 31 S. E. R. * * *

If, in accordance with the general rule, the adjudication of the State Court construing its own Constitution is to be followed by the Federal tribunal, then the two Acts of 1881, and of 1879, which are recited as authority for the issue of the bonds, are unconstitutional and confer no right upon the plaintiffs in error as bondholders.

Norton v. Shelby County, 118 U. S., 425.

THE CONTENTION OF PLAINTIFFS IN ERROR.

Has this case been brought within the exception laid down in Burgess v. Seligmon, supra? It is contended that there were prior adjudications inconsistent with the decision in Bank v. Commissioners, which had become rules of property, and which adjudications were overruled in that case. The decisions fail to support such contentions.

If section 14, article 2, of the Constitution of North Carolina had never been construed by an adjudication of the Supreme Court of the State prior to that in Bank v. Commissioners, 119 N. C., 214, and, if for that reason, it should be conceded that the duty of interpreting its meaning now devolves upon the Supreme Court of the United States, the defendants in error would have no ground to apprehend that a construction different from that adopted by the State tribunal would be placed upon language so plainly prohibitory and mandatory as that used in said section. *The authority to construe will not be held to involve the right to judicially amend the Constitution.*

23 Am. and En. Enc., 453.
Cooley's Cons. Lim. (6th Ed., '89).

It has been contended, however, that the opinion in Bank v. Commissioners, 119 N. C., 214, in effect overruled the opinion in the same case, when it was previously before the court, as reported in 116 N. C., 339, on the one hand, and that on the other hand it overruled the older adjudications in Carr v. Coke, 116 N. C., 243; Broadnax v. Groom, 64 N. C., 244; and Scarborough v. Robinson, 81 N. C., 236. When the case of Bank v. Commissioners, 116 N. C., 339, was tried in the lower court, no evidence was offered to show that the provision of the charter purporting to authorize the subscription had not been enacted in accordance with the Constitutional requirements, and the court only passed upon the sufficiency of the authority conferred by the terms of the statute, which in the absence of proof was presumably valid, and, upon the validity of a contract under a statutory provision, to compromise a debt for less than its face value. See 116 N. C., at page 220. The same question arose in Amoskeag National Bank v. Ottawa, supra, where the Court said:

"Nor is it of any importance that the Acts of 1857 had been assumed to be an existing law in Dunovan v. Green, 57 Ill., 53, and Force v. Battavia, 51 Ill., 99; for in each of those cases *the validity of the statute was not controverted*, and by the established practice of that court no evidence of the contents of the Journals could be considered on appeal which had not been produced and made part of the case in the court below."

JUDGE PURNELL MISCONCEIVES FACTS AND ERRS IN CONCLUSIONS OF LAW.

So in Bank v. Commissioners, supra, the validity of the act authorizing the subscription was not controverted on the first trial and no evidence of the contents of the Journals was offered. Judge Purnell, of the Eastern District of North Carolina, in a recent opinion filed in the Circuit Court at Raleigh, seems to have misconceived the facts, and therefore to have misstated the law applicable. His opinion, in effect, overruled that of the Supreme Court of North Carolina, and rests upon the erroneous supposition that the second ruling in Bank v. Commissioners, supra, was inconsistent with that first enunciated.

In Bank v. Commissioners, 119 N. C., at page 222, Justice Clark very clearly distinguishes that case from Carr v. Coke, supra, as follows:

"This case bears no analogy to Carr v. Coke, 116 N. C., 223, which merely holds that when an act is certified to by the Speakers as having been ratified, it is conclusive of the fact that it was read three several times in each House and ratified. Constitution, article 2, section 23. And so it is here; the certificate of the Speakers is conclusive that this act passed three several readings in each House and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each House, and that the yeas and nays were entered on the Journals. The Journals were in evidence and showed affirmatively the contrary.

"The people had the power to protect themselves by requiring in the organic law something further, as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns, than the fact certified to by the Speakers of three readings in each House, and ratification. This organic provision plainly requires, for the validity of this class of legislation, *in addition* to the certificates of the Speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the Journals on the second and third readings in each House. It is provided that such laws are 'no laws,' i. e., are void unless the bill for the purpose shall have been

read three several times in each House of the General Assembly and passed three several readings, which readings shall have been on three different days, and approved by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal. This is a clear declaration of the nullity of such legislation unless this is done, and every holder of a State or municipal bond is conclusively fixed with notice of this requirement as an essential to the validity of the bond."

In Scarborough v. Robinson, 81 N. C., 409, the only question involved was, whether under proper construction of section 23, article 2, of the Constitution, which requires that all bills and resolutions of a legislative nature shall be read three times in each House and shall be signed by the presiding officers of both Houses, a bill which was passed in each House but was not signed by such officers could be enforced as the law, and whether the defect could be cured by mandamus requiring said officers to sign after the expiration of the legislative session. The Court held the bill without such signatures incurably defective.

In Broadnax v. Groom, 64 N. C., at page 247, Chief Justice Pearson said, *obiter*, "We do not think it necessary to enter into the question, whether this is a *public local act*, or mere *private act*, in regard to which thirty days' notice of the application must be given." With this introduction he proceeded to discuss the question whether the courts would go behind signatures of the presiding officers, if a proper case were presented for adjudicating the question. Section 12, article 2, of the Constitution, provides that:

"The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such law shall have been given, under such direction and in such manner as shall be provided by law." While the learned Chief Justice compared an act so signed to a record he said, in this *obiter* expression of his views, that courts must act on the maxims "omnia presumuntur." As, under this provision of the Constitution, the Legislature was required to provide the manner of giving such notice, and had provided

by statute that notice should be given by publication in a newspaper for the prescribed time, and as no means were provided in the Constitution or statute for making such notices matters of record, it is clear that the comity, due to a co-ordinate branch of the Government from the courts, required them to act upon the presumption that the Legislature had before it satisfactory information that the proper notice had been given. An analogous case is found in the interpretation of section 1, article 8, of the Constitution, which provides that "corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, *and in cases where in the judgment of the Legislature, the object of the corporation can not be attained under general law.*" The volumes of special acts passed by the General Assembly are held not repugnant to this section, because it is presumed to be the judgment of the Legislature in every instance that the object can not be attained under general law.

The distinction between the enactment of a private law and the passage of an act coming within the purview of section 14, article 2, will clearly appear, therefore, upon an examination of section 16, article 2, of the Constitution, already cited, and which provides that "each House shall keep a Journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly." In Amoskeag National Bank v. Ottawa, supra, it was held that "the printed Journals of each House of the Legislature published in obedience to law are competent evidence of its proceedings." Where such a mandate of the law is obeyed there is no longer room for presumption, while on the other hand where no record is required or made, comity requires that the court should assume that the Legislature acted in accordance with law. The Court said in Amoskeag National Bank v. Ottawa, supra:

"The copies of the Journals, certified to by the Secretary of State, and the printed Journals published in obedience to law, are both competent evidence of the proceedings in the Legislature."

So that the presumption arises upon the signature of the two presiding officers that everything antecedent to the signing

was done in accordance with the requirements of the law, but that presumption may be rebutted by *exhibiting the Journals, which the law has carefully provided for preserving as evidence. But there being no evidence or means provided for preserving the evidence as to notice of an application for the enactment of a private law*, the presumption that first arises must, ex necessitate, remain for want of means or evidence to rebut it.

THIS ACTION NOT BROUGHT TO REPUDIATE A MORAL OR LEGAL OBLIGATION, BUT TO ASSERT THE INDIVIDUAL RIGHTS OF TAXPAYERS.

Since Mr. Webster presented with so much diffidence and distrust, as Mr. Lodge tells us, the proposition that the inhibition of the Constitution (art. 1, sec. 10) was intended, as well to prevent a State from repudiating its own contracts, as from giving its sanction to the impairment of contracts between persons, the evolution of the principle enunciated in the Dartmouth College Case has been so extensive, as to fill with wonder those who are accustomed still to recur to the Constitution, as understood and interpreted by its framers, as a chart for the guidance of the courts in fixing just limits to the delegated powers of the Government.

In the laudable desire to foster commerce, by inspiring confidence in all securities thrown upon the markets of the country, courts are prone to forget or overlook the rights of the individual taxpayers, who are often heavily burdened to pay bonds issued by the municipalities in which they have property. As the taxpayer reviews the history, (which seldom reaches the higher courts), of the irregularities often attendant upon the creation of such debts, it is no ground for surprise if his faith is sometimes shaken in the trite boast of our jurists that the English and American systems of jurisprudence were founded upon the bedrock principle that the governments are created primarily for the protection of the weak against the strong, and of the poor against the power of wealth. The people still believe, that high above the turbid atmosphere, where the power of aggregated wealth fits burdens to the backs of the poor, there is a tribunal that will forever protect the pennies

of the poor as well as the pounds of the rich. Before such a court they dare present their grievances without fear that individual right will be ignored because their petitions may be drowned in denunciations of cultured counsel. Confident that the clear presentation of a legal right can not be obscured by the cry of repudiation or communism, so often used to cover up oppression, the defendants may be pardoned for calling attention to the irregularities, which they contend have been already cured in this, as in hundreds of other cases, where counties have created debts. A change of names will fit the leading facts to each particular case. A railroad company acquires an influence over the Board of County Commissioners, who agree to submit the question of subscription. In order to obviate the requirement that the proposition must receive the sanction of a majority of the registered or qualified voters, arrangements are made, through the Board, to have a large number of names stricken from the registration books and the result of the election ascertained and declared upon an examination of sch lists of voters. While some of the taxpayers are subsequently concerting measures to prevent the issuing of bonds, the Board, after the final declaration of the result of the election, combines with the railroad corporation to place the bonds upon the market. The taxpayers being without organization, and poorly provided with money, their agents being controlled by their oppressors, are told that all irregularities are cured, or still worse, that foreign bondholders have brought suit in the Federal Circuit Courts and the Commissioners have suffered the county and the taxpayers to be forever precluded by a judgment declaring the bonds valid.

Where the taxpayers, as in this case years ago, submitted to a nonsuit, in the fear of a repetition of the history of similar controversies in other counties, they were startled to learn a few years ago that any legislator had ever been so careless, incompetent, or corrupt as to allow to be disregarded the plain mandate of the Constitution that "no law shall be passed to raise money on the credit of the State or to *pledge the faith of the State directly or indirectly, or to allow the cities, counties or towns to do so*, unless the bill for the purpose shall have been read three several times in each House," etc.

It was a revelation to the people of the State, when investigation following upon the heels of the rendition of the opinion in Bank v. Commissioners, 119 N. C., 214, disclosed the fact that the bonded indebtedness of a half dozen counties had been created contrary to law. After such frauds have been for years concealed under the specious cover of irregularities, a new Board of Commissioners of Wilkes County, who happen to be free from corporate control, and to have heard the just complaints of the taxpayer, determined to appeal to the courts. Their just demands are met, at the threshhold, with the objection that the language of the Constitution, which is too plain to mislead the most *ignorant and illiterate, had not been* interpreted before the contract was entered into by issuing the bonds in 1889. The perfect law is one so plain and unmistakable in its terms as to need no construction by the courts. If the meaning of every prohibitory provision of our law were as obvious as that of the section in question, no citizen of North Carolina could justly complain that the law did not excuse ignorance of its requirements. *Shall it be solemnly declared by the courts, as the new doctrine, enunciated in Burgess* vs. *Seligman, that well-established rules must be disregarded to the detriment of the citizens of a State, because its lawgivers possessed the rare faculty of crystallizing a Constitutional prohibition in plain terms—in language so unmistakable that no one for twenty-five years ever questioned its obvious meaning?*

THIRD ASSIGNMENT OF ERROR.

"3. That the Court erred in holding that the subscription of $100,000 to the capital stock of the Northwestern North Carolina Railroad Company by the Board of Commissioners of Wilkes County, was not authorized by the provisions of The Code of North Carolina, sections 1996 to 2000, inclusive. And the said J. M. Welburn and J. M. Turner, plaintiffs in error, say that the said ruling was in violation of section 10, article 1 of the Constitution of the United States and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board."

Section 1996 of The Code provides, the "Boards of Commis-

sioners of the several counties shall have power to subscribe stock to any railroad company or companies, when necessary, to aid in the completion of any railroad, in which the citizens of the county may have an interest."

Section 1999 provides that, "In case the county shall subscribe the amount proposed in bonds the Board of Commissioners shall have power * * * to raise by taxation from year to year the amount necessary to meet the interest on said bonds."

The Act of 1885 (chap. 174, sec. 23 of the Laws of 1885) provides, that "If the tax levied by the State for the support of the schools shoud be insufficient * * * then the Board of Commissioners of each county shall levy annually to supply the deficiency," etc.

The appellants contended:

1. That long before the date when the bonds in controversy were issued (on October 1, 1889), the Supreme Court of North Carolina had so construed article 5, sections 1, 6 and 7, of the Constitution of North Carolina, as to render the said sections of The Code invalid and insufficient, as authority to the Board of Commissioners of Wilkes County to create said debt and levy tax essential to its creation, and established a rule of property for the protection of the taxpayers of said county, of which the purchasers of the bonds in controversy had constructive notice, before purchasing, and that the Federal courts are bound to follow the said construction, placed by the highest appellate court of North Carolina upon its own Constitution and statutes, and to pronounce the said sections of The Code insufficient to clothe the said Commissioners with power to create the said debt.

2. That long before the time when said bonds were issued the Supreme Court of North Carolina had construed language used in article 5, section 4, of the Constitution of the State, synonymous in meaning and almost identical in terms with that employed in section 1996 of The Code, and that under such interpretation the Board of Commissioners of the county of Wilkes were not authorized by the said section to create a debt in aid of an unfinished road, such as the Northwestern

North Carolina Railroad was admitted to have been, when said subscription was made, or in aid of any railroad, in which the said county of Wilkes at the time had no pecuniary interest, and that the Federal courts were bound to follow such interpretation of the statutes made before the said bonds were issued, and the purchasers of said bonds were deemed to have had notice of such rulings.

3. That if the said sections of The Code were not invalid under any ruling of the highest court of the State, made before the bonds in controversy were issued, the construction placed by the Supreme Court of North Carolina upon said sections was reasonable, and, if the question whether said ruling was correct was "balanced with doubt" it was the duty of the Federal Court, in obedience to the ruling of the Supreme Court of the United States, to resolve such doubt in favor of the adjudication by the State tribunal.

CONTENTION OF DEFENDANTS.

The defendants contended that the said sections of The Code had never been construed and pronounced insufficient to authorize the creation of a bonded debt by a county prior to the date when the bonds were issued, and that therefore the Federal courts were at liberty to construe said section according to the interpretation of its true meaning.

I.

Was section 1999 of The Code invalid and insufficient under article 5 of the Constitution to authorize the creation of the debt?

The pertinent sections of article 5 above mentioned are as follows:

"Section 1. The General Assembly shall levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which shall be equal on each to the tax on property valued at $300 in cash * * * The State and county capitation tax combined shall never exceed two dollars on the head."

"Sec. 6. The taxes levied by the Commissioners of the several counties shall be levied in like manner with the State taxes, and shall never exceed the double of the State tax *except for a special purpose and with the special approval of the General Assembly.*"

"Sec. 7. Every act of the General Assembly *levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other.*"

At the October Term, 1885, of the Supreme Court of North Carolina, and nearly five years before the bonds were issued, on October 1, 1889, the Supreme Court of North Carolina construed section 23, chapter 174 of the Laws of 1885, and declared that it was insufficient to authorize the Board of Commissioners of Sampson County to levy a special tax, in order to raise a fund sufficient to maintain the public schools in said county for four months in the year. Although it was provided in the State Constitution that "one or more public schools shall be maintained at least four months in every year, and, if the Commissioners of any county shall fail to comply with the aforesaid requirement of this section, they shall be liable to indictment" (art. 9, sect. 3), the Court held, that a levy under the Act of 1885 for such purpose was unauthorized. The said statute was as follows:

"Sec. 23. Section 2590 of The Code is amended to read as follows: If the tax levied by the State for the support of the public schools shall be insufficient to maintain one or more schools in each school district for the period of four months, then the Board of Commissioners of each county *shall levy annually a special tax to supply the deficiency for the support and maintenance of said schools for the said period of four months or more.* The said tax shall be collected by the sheriff in money, and he shall be subject to the same liabilities for the collection and accounting of said tax as for other taxes. The said tax shall be levied on all property, credits and polls of the county; and in the assessment of the amount on each the Commissioners shall observe the Constitutional equation of taxation; and the fund thus raised shall be expended in the county in which

it is collected in such manner as the County Board of Education may determine, for maintaining the public schools for four months at least in each year," etc.

Comparing the provisions of The Code, we find that after providing in section 1996 that "The Boards of Commissioners of the *several counties* shall have power to subscribe stock to any railroad company," etc., and specifying in sections 1997 and 1998 how elections may be held in any county and how subscriptions may be made, the pertinent section 1999 is as follows:

"In case the county shall subscribe the amount proposed in bonds, the Board of Commissioners shall have power to fix the rate of interest, not to exceed the rate of 8 per cent, when the interest on said bonds shall be payable and at what place, and to also fix the time and place of paying the interest, and shall also determine the mode and manner of the same; *and also to raise by taxation, from year to year, the amount necessary to meet the interest on said bonds.*"

In Barksdale v. Commissioners, 93 N. C., 472, 475, Chief Justice Smith, for the court, said in the year 1885, four years before the bonds were issued on October 1, 1889:

"The levy finds no support in section 6, article 5, for this is not one for 'a *special purpose* and with the *special* approval of the General Assembly' for *county purposes.* The enactment is in general *applicable to the whole State*, and part of the general State legislation in furnishing facilities for the education of its people. *It can not find shelter* under any of the numerous adjudications sustaining the power to tax beyond the assigned restraints, and in disregard of the established ratio between State and county taxation, which will be found at the foot of the section":

"This form of taxation is *local as well as special*, and *such has been the legislative interpretation of this clause in the frequent cases in which a special approval has been asked and obtained.*

Broadnax v. Groom, 64 N. C., 244.
Simmons v. Wilson, 66 N. C., 336.

Mauney v. Commissioners, 71 N. C., 486.
Trull v. Commissioners, 72 N. C., 288.
French v. Commissioners, 74 N. C., 692.
Cromartie v. Commissioners, 87 N. C., 134."

"These cases settle the extent of the taxing power when exercised by the county authorities, and allow its restraints only to be disregarded, when the tax is needed to meet obligations existing before the Constitution by virtue of the Constitution of the United States, etc. * * * But as the repugnance of the provisions under consideration is manifest, the Commissioners must refrain from assessments, however necessary for schools, which pass the bounds of conferred power." The language which the Court said would be found at the foot of the section is: "except for a *special purpose* and *with the special approval* of the General Assembly."

The authority to levy a tax was conferred in the Act of 1885 upon the "Board of Commissioners of each county," and this was held unconstitutional, not because *it appeared, whether the tax would exceed the limit, but* because it *was not special* in *pointing out the specific county*, nor *local* in *confining the authority to a specified municipal* corporation or county, so that the representatives of the community affected would have notice. Did not every purchaser of a bond issued in 1890 have notice of this decision as a part of the laws of the State? It recited the sections of The Code, where the authority purported to be given to "the Commissioners of the several counties" to subscribe and to the "Board of Commissioners of any county" to order an election, followed by section 1999, purporting to vest the power to levy a tax for schools (not for the ordinary expense of the counties)—a tax which the Legislature could not delegate the authority to levy, without a valid provision in the statute granting the right to levy.

Cons. Lim., art. 5, sec. 7.

In Board of Edcation v. Commissioners, 111 N. C., 579, the Court again construed section 23, Laws of 1885, and adhered to the older ruling. The Court said at page 580: "It appears from an examination of the authorities that no case has ever come

before the courts involving the exercise of this *special power* of taxation by the counties, except *upon special* or *private acts* for local objects, *until the Act of 1885 was brought* to our attention." It thus appears that the court has constantly and persistently construed section 6, article 5, of the Constitution in the same way.

In the same opinion (111 N. C., at p. 580) the Court said: "It is well settled, that for the *ordinary expense* of the government, both State and county, the first section of article 5 of the Constitution places the limit of taxation and preserves the equation between capitation and property."

In Board of Education v. Commissioners, 107 N. C., 110, 113, Chief Justice Merrimon, for the court, said: "And, moreover, the several counties can levy taxes to meet the *ordinary expenses of the county government* within the limitation of taxation mentioned." The utmost latitude allowed by the court in the enactment of these laws providing for the levy of taxes above the Constitutional limit or for other purposes than the ordinary expenses of the counties, is, that the Legislature is not bound under the ruling in Broadnax v. Groom, 64 N. C., at page 248 (which has been discussed in another connection) "*to set out the precise sum*" to be raised by the levy.

In Vaughan v. Commissioners, 117 N. C., at page 434, the Court said: "It is within the province of the courts to determine what are necessary public buildings and what classes of expenditures fall within the definition of necessary expenses of a municipal corporation." Satterwaite v. Commissioners, 76 N. C., 154. The terms "ordinary" and necessary expenses are thus used to mean the same thing.

In the case of Commissioners of Buncombe County v. Payne, decided at the last term and not yet reported, the Court said (after referring to art. 5, sec. 6, of the Constitution): "A general act authorizing any and all counties to issue bonds for railroad purposes would be invalid, especially when (as is the case here) it is necessary to exceed the Constitutional limitation to pay interest or principal."

Tate v. Commissioners, 122 N. C., 812 (at p. 815).
Herring v. Dixon, Id., 420 (at p. 424).

Barksdale's case did not depend upon the question whether the limit would be exceeded in any given case It was held sufficient, as in our case, that it might become necessary to exceed it.

In Tate v. Commissioners, the Court said (referring to older adjudications cited in Herring v. Dixon, supra): "For other purposes, than necessary expenses, a tax can not be levied either within or in excess of the Constitutional limitation except by a vote of the people under special legislative authority."

It is provided in article 7, section 7, of the Constitution, that "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied, or collected by any officer of the same, except to meet the necessary expenses thereof, unless by a vote of a majority of the qualified voters therein."

These adjudications had established as the settled construction of the Constitution of North Carolina by its highest court before July 1, 1890:

1. That no debt could be created by a county, except for its "necessary" or, what was *declared* to *be synonymous*, its "*ordinary*" expenses.

2. That a subscription to the capital stock of a railway company, like a levy for schools, is not an ordinary or necessary county expenditure.

3. That a tax levied to meet a bonded debt, created by such subscription, is a special tax, the levy of which is imperatively required by section 7, article 5, to be provided for in the act authorizing the creation of the debt, and which, under the mandate of article 5, section 6, supra, can not be imposed without express authority specifically conferred on a particular county or other local agency of the State.

THE GENERAL RULE AS TO JURISDICTION.

"It must be regarded as a settled question, that whether statutes of a Legislature of a State have been duly enacted, in accordance with the requirements of the Constitution of each State, is not a Federal question and the decision of the State courts, as to what are the laws of the State, are binding upon the courts of the United States."

Leiper v. Texas, 139 U. S., 167.

"It is undoubtedly a question of local policy with each State, what shall be the extent and character of the powers which the various political and *municipal organizations shall possess*, and the settled decision of the highest court on this subject will be regarded as authority by the courts of the United States, for it is a question that relates to the internal constitution of the body politic of the State."

Clairborne v. Brooks, 111 U. S., 410.

The decision of the State Court in this case can not be reviewed, unless it clearly appears that a right claimed under the Constitution, section 10, article 1, has been impaired by the adjudication complained of.

Cooley's Con. Lim. (6th Ed.), 20, 21, 22, and note of page 210.

Fall Brook Irrig. Dist. v. Bradley, 164 U. S., 112.

The ruling of the State's highest appellate court, that a statute is consistent with a provision of its Constitution (and upon the same principle that it is inconsistent with its organic law) is conclusive upon the Federal tribunals.

Merchants, etc., Bank v. Pennsylvania, 167 U. S., 112.

THE CONTENTION OF PLAINTIFFS IN ERROR.

The plaintiffs in error insist that this case is brought within the exception to the general rule, that governed the court in Folsom v. Township, 96, 159 U. S., 611, and Shelby County v. Union Bank, 161 U. S., 149, 151, which follow the rule laid down in Burgess v. Seligman, 107 U. S., 20, and which was as follows: "So where contracts and transactions have been entered into, and rights have accrued thereon, under a particular state of the decisions, or where there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts, after such rights have accrued. *But even in such cases, for the sake of harmony and to avoid confusion the Fed-*

eral Court will lean towards an agreement of views with the State courts, if the question seems to them balanced with doubt.

If the construction placed upon article 5, sections 6 and 7 of the Constitution, that an act, authorizing the levy of a county tax for any other purpose than the ordinary or necessary expenses of the county, was unconstitutional if not specific became "a rule of property," when the decision was made in Barksdale v. Commissioners, supra, in 1885, the taxpayers of Wilkes County (represented here both by their agent and one of their number) have a right to invoke that rule as a protection against a tax attempted to be imposed upon them in October 1, 1889, even under the rule as stated in Shelby County v. Union Bank, 161 U. S., at page 151.

If upon a review of all the facts in this case, the question whether a Constitutional right of the plaintiffs in error has been invaded, or the question whether the right of the defendants, as taxpayers, to invoke a rule of property would be impaired by the assumption of jurisdiction by the Federal courts, is "balanced with doubt," the Federal courts have no power to interfere under the ruling relied upon by the plaintiffs in error.

Burgess v. Seligmon, supra.

A review of all the cases, that have recently arisen, involving the validity of municipal bonds, shows that these general laws have not been recited in any of the bonds brought in question, except in the single instance of the Stanly County bonds, and this course has doubtless been adopted because of the fact that the astute lawyers, who have prescribed the forms of the bonds, had no confidence in their efficacy, as a delegation of power to a particular county. See

Bank v. Commissioners, 119 N. C., 214.
Commissioners v. Snuggs, 121 N. C., 394.
City of Charlotte v. Shepperd, 120 N. C., 411, 122 N. C.
Rodman v. Washington, 122 N. C., 39.
Board of Commissioners v. Call, 31 S. E. R., 481.
Commissioners v. Payne, 31 S. E. R.

JUDGE SIMONTON OVERLOOKS BARKSDALE V. COMMISSIONERS, 93 N. C., 472, IN HIS OPINION, 89 FED. REP., 257, 265.

It is a significant fact that Judge Simonton, in an elaborate opinion construing sections 1996 to 2000 of The Code, overlooks the adjudication made before the bonds were issued in Barksdale's case, supra. In view of the rendition of that decision in 1885, the rule laid down by Judge Simonton (on p. 261 of 89 Fed. Rep.), does not apply in construing the sections of The Code, for the reason that *the bonds were not issued*, and of course the holders did not "become owners of municipal bonds before the decision of the State court invalidating them."

But if what has been said is not sufficient to show that sections 1996 to 2000 are insufficient as authority within the meaning of article 5, section 6, of the Constitution, the Court, in Commissioners v. Snuggs, 121 N. C., at page 403, said: "This reasoning leads us to the still further conclusion, that at the time when the Act of 1868 was brought forward, in The Code, sections 1996 and the four succeeding sections, it could have had reference to no cases, except those where the counties had a pecuniary interest in the unfinished roads, *at the adoption of the Constitution of 1868*, and that, therefore, The Code sections could not apply to the present case because the Yadkin Railway Company had not begun to construct the Wilkesboro branch of its road, and had not located said branch until long after the ratification of the Constitution of 1868." The words "direct pecuniary interest" has been construed by the Court in Galloway v. Railroad, 63 N. C., at pages 155, 156 and 158. The Court, in Commissioners v. Snuggs, supra, construed section 1996 of The Code to refer only to a direct pecuniary interest in a road unfinished in 1868, when the act was first passed. Authorities from many courts can be cited to show that the word "interest," in such a connection as used in that section, implies ex vi termini, a pecuniary interest, which it must be conceded the county of Wilkes did not have in 1887 to 1889.

Taylor v. Norment, 88 Ill., 527.
McGrath v. People, 100 Ill., 464.

Lenter v. Almeda County, 45 Cal., 7.
State v. Eastern R. C., 36 N. J. L., 184.
Shelton v. Derby, 27 Conn., 415–425.

The contract was made in contemplation of the decision in Galloway v. Railroad, supra, which the Court in Commissioners v. Snuggs, supra, had construed similar language in the Constitution, and that the Act of 1868 was intended to restrict counties, as the State was restricted to roads unfinished on April 24, 1868, when it is not pretended that work had been begun on the line. But the Court say that interest means pecuniary interest, and in that respect its construction is in accord with the current of authority elsewhere.

Supposing, then, that the Commissioners have relied solely upon this view, would the Supreme Court treat the State Court with so little consideration, as to say, that the question is not even balanced with doubt? True we do not think it is necessary to pass upon that construction, because the statute, as held in Commissioners v. Payne, 31 S. Rep., following Barksdale v. Commissioners, fails to meet the demands of section 6, article 5, of the Constitution.

FIRST ASSIGNMENT OF ERROR

is as follows:

"1. That the Court erred in holding that the original charter of the Northwestern North Carolina Railroad Company and the amendments thereto, enacted in the year 1868, did not authorize the Board of Commissioners of Wilkes County to submit the question whether said county should subscribe to the capital stock of said company, or to subscribe $100,000, with the approval of the qualified voters of said county, to the capital stock of said company. And said J. M. Turner and J. M. Welburn, plaintiffs in error, say, that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section, by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board."

The original charter, (chap. 17 of the Constitution and Ordi-

nances of 1868) was passed by the Constitutional Convention on the 9th of March, 1868.

Where a subscription had been authorized by any legislation before 1868, when there was no Constitutional requirement as to the manner of passing such acts, or, as to the sanction of the voters of a municipality, the authority became nugatory as to any inchoate contract of subscription by such corporations on the 24th of April, 1868.

Norton v. Brownsville, 129 U. S., pages 479–493.
Aspinwall v. Commissioners, 22 Howard, 364.
Wadsworth v. Supervisors, 102 U. S., 534–553.
Railroad v. Falconer, 103 U. S., 821.
Falconer v. Railroad, 69 N. Y., 491 (cited in Norton v. Brownville, supra, p. 490)..
Town of Louisville v. Portsmouth V. C. Bank, 104 U. S., pages 469–479.

"These cases (said Chief Justice Fuller in Norton v. Brownville, supra, referring to Concord v. Portsmouth Savings Bank, 92 U. S., 625; Falconer v. Railroad, supra; Railroad v. Falconer, supra; Wadsworth v. Supervisors, 102 U. S., 534–537; and Aspinwall v. Commissioners, 22 Howard, 364), sufficiently illustrate the distinction between the operation of a *Constitutional limitation upon the power of the Legislature, and a Constitutional inhibition upon the municipality itself. In the former case past legislation is not necessarily affected, while in the latter it is annulled.*" This was said in construing a provision in the Constitution of the State of Tennessee, substantially the same as section 7, article 7, of the Constitution of North Carolina, ratified April 24, 1868. If the inhibition contained in article 7, section 7, in section 14, article 2, and in article 5, sections 6 and 7, were self-executing and operated directly upon the counties, then it is clear, that on the 24th of April, 1868, the charter granted by the Constitutional Convention on the 9th of March, 1868, was nugatory, as authority to a Board of Commissioners to create a bonded debt in the face of the first two inhibitions as well as for the reason that the subscription involved the levying of a tax not "for county purposes" (held

to mean the "ordinary expenses" of the county), but for "a special purpose," which required a new act granting "the special approval of the General Assembly."

The material provision of the original charter (Ordinances of the Constitutional Convention of 1868, chap. 17, p. 57), are as follows:

"Sec. 2. That the capital stock of said company may be created by subscriptions on the part of individuals, corporations and counties in shares of $100."

"Sec. 12. Be it further ordained that the stockholders of said company may pay the stock subscribed by them either in money, labor or material, for constructing said road, as the Board of Directors may determine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of the said company."

The act referred to in the ordinance is chapter 136 of the Laws of North Carolina of 1852. The particular section is 34, on page 499 of said act, and is in the following words:

"Sec. 34. Be it further enacted, That the corporate authorities of such towns, or the Justices of the Peace of such county, a majority of the justices of the county concurring to make an order requiring the constable of such town and the sheriff of such county, at such time and on such notice as they shall direct, to open a poll and take the sense of the voters of such town qualified to vote for town officers, and of the voters of such county qualified to vote for the Members of the House of Commons of the General Assembly, whether the officers of said town and the Justices of the Peace of said county shall subscribe to the stock of such company for such sum as the order shall propose, and the constable shall make return of the number against it, and the sheriff shall, in like manner, make return as to the vote in his county to the first court thereafter to be held for such county, and it shall be the duty of the sheriff to notify each justice of said county to attend at the courthouse to which he may make his returns of said poll."

The Constitution of North Carolina, containing the clauses limiting the power of municipalties to create debts, above set forth in full and for the first time incorporated in the organic law, was ratified by the people of the State at an election held on the 21st, 22d and 23d of April, 1868. The charter of the Northwestern North Carolina Railroad Company had been enacted by the Constitutional Convention long before the Constitution was finally passed upon as a whole, in March, 1868.

The foregoing authorities have established the principle that a subscription made under an enabling provision in a charter granted before such restrictive clauses as those adopted by the State of North Carolina in 1868 were embodied in the Constitution of the State, is not valid without new legislation, unless the contract was completed before the ratification and adoption of the Constitution. The bonds in this case having been issued since the 24th of April, 1868, and under agreement entered into by Wilkes County since that date, it is clear that the charter standing alone does not authorize the creation of the debt. Was the debt authorized by the amendment of the 11th of August, 1868? This act is contained in the Private Laws of North Carolina of the Special Session of 1868, and is as follows:

"Sec. 1. The General Assembly of North Carolina do enact: That an ordinance entitled 'An ordinance to incorporate the Northwestern North Carolina Railroad Company,' ratified the 9th day of March, A. D. 1868, be and the same is hereby re-enacted, ratified and confirmed, and all *acts and things heretofore done* under the provisions of the said ordinance *are hereby ratified and* confirmed."

"Sec. 2. That all the rights, powers and authorities conferred or purporting to be conferred by said ordinance, incorporating the Northwestern North Carolina Railroad Company, or the Justices of the Peace of Forsyth County, or on the County Court of said county, be, and the same are hereby conferred on the Commissioners of said county."

"Sec. 3. The Commissioners of the county of Forsyth are hereby invested with full powers and authority to levy from time to time such tax as may be sufficient to pay the subscrip-

tion made by said county to the capital stock of the Northwestern North Carolina Railroad Company, and any interest due thereon, or to liquidate any debt created by said county in borrowing money to pay such subscription stock. Ratified the 11th day of August, 1868."

THE AMENDMENT PASSED AT THE SPECIAL SESSION OF 1868 AND RELIED ON BY JUSTICE FURCHES IN HIS DISSENTING OPINION TO SUSTAIN THE VALIDITY OF THE BONDS, WAS NOT ENACTED BY THE GENERAL ASSEMBLY IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 14, ARTICLE 2, OF THE CONSTITUTION.

Justice Furches, in his dissenting opinion, calls attention to the fact that the counsel representing the plaintiff in error here, who were defendants in the State courts, and the counsel for the defendant here, who were plaintiffs in the State Court, signed an agreement setting forth a list of the statutes to be examined and considered by the Court in passing upon the question whether the county of Wilkes was clothed with the power to create the bonded debt. The learned Justice concludes that he is warranted in considering said act as before the court, because Clarence Call, Sheriff and ex-officio Treasurer of Wilkes County, who was a party-defendant in the original action in the Superior Court of Wilkes County, and did not appeal from the order enjoining and restraining him from paying the special tax fund collected by him for the purpose, in discharge of the accruing coupons on said bonded debt, was not a party to said agreement omitting the said private act from the list of acts to be so considered. It has been made proper, if not necessary, that the counsel who did sign said agreement should submit a paper explanatory of the omission to be considered as a part of the record in the Supreme Court of the United States, which paper is as follows:

"Supreme Court of the United States—October Term, 1898.

"J. M. Turner and J. M. Welburn, Plaintiffs in Error,

"against

"The Board of Commissioners of Wilkes County and C. C. Wright, Defendants.

"In error to the Supreme Court of North Carolina.

"The undersigned, Richard N. Hackett and A. C. Avery, representing as counsel respectively the plaintiff in error and the defendants above named, have observed that Justice Furches, in his dissenting opinion, calls attention to the fact that they omitted specifically to mention the Act of August, 1868, as one of the statutes purporting to authorize the Commissioners of Wilkes County to create the bonded debt which gives rise to the controversy and deem it due to themselves to submit a statement by way of explanation.

"Out of abundance of caution counsel had filed certified copies of extracts from the legislative Journals and certificates of the Secretary of State as custodian of the Journals, showing the failure to pass certain other amendments to the charter of the Northwestern North Carolina Railroad Company in the manner prescribed by section 14, article 2, of the Constitution; but those records and certificates had cost the county from twenty-five to fifty dollars each. It has not been directly decided in North Carolina, that the printed Journals of the legislative Houses would be competent evidence, though it had been so held in construing similar provisions of the Constitution and laws of Illinois.

"It appeared from an inspection of the Journals of the Senate of North Carolina of the session of 1868, that on the 24th day of July, 1868, (see p. 97 printed Journals of Senate of 1868), Senate Bill 45, 'A Bill Ratifying and Confirming the Charter of the Northwestern North Carolina Railroad Company,' was considered in Committee of the Whole and reported by the committee recommending its reference to the Committee on Internal Improvements; that on the 25th day of July, 1868, Mr. Forkner, for said committee, reported said bill back to the

Senate and recommended its passage (see printed Senate Journal, p. 101), and that no further action was taken on said bill until July 27 (see pp. 101 to 108, both inclusive, of said printed Journal of the Senate), when the following entry appears: 'The report of the Committee on Internal Improvements, to whom was referred S. 45, A bill ratifying and confirming the charter of the Northwestern North Carolina Railroad Company was taken up and concurred in by the Senate.

"'The bill passed its third and final reading by the following votes: * * * ' The language above quoted from the Journals is followed by a statement of the names of 33 Senators voting yeas and that there were no nays. The undersigned were unable to find any evidence in the Journals that the said bill had been passed by the Senate on its second reading and on a call of the yeas and nays, on a day different from that on which it passed its third reading in said body.

"The undersigned find (see p. 109 of the printed Journal of the House at the same session) that on the 28th day of July the said bill was transmitted to the House of Representatives, and that on August 11 the following account is recorded of its passage on the third reading, to-wit:

"'The Senate Bill to ratify the charter of the Northwestern North Carolina Railroad Company passed its third reading.'

"The undersigned find also that on the 11th day of August, 1868, said bill was enrolled and was signed by the Speaker and was transmitted to the Senate, and that therefore the act referred to by Justice Furches was not passed in the manner prescribed by the Constitution.

"The undersigned therefore submit as an explanation of the omission to which Justice Furches calls attention, that they did not deem it necessary to subject the county of Wilkes to the expense of offering the certified record of legislative proceedings, for the reason, that the question whether an act not passed in conformity to the said requirement of the Constitution was valid had already been raised under the Act of 1879 recited as authority for issuing the bonds, and if the Court should hold the Act of 1879 invalid, the Act of August, 1868, passed after the ratification of the Constitution of 1868 would

also be held invalid; but if the Court should hold that the Act of 1879 was valid as authority for issuing the bonds, it would be unnecessary to look for further authority in the Act of 1868.

"Respectfully submitted,

"RICHARD N. HACKETT,
For Plaintiffs in Error.
"A. C. AVERY,
For Defendants."

In the same way, counsel, as was done in order to save cost to the county of Buncombe in Commissioners v. Payne, decided at the same term, might have agreed that sub-section 4, section 8, chapter 20, of Battle's Revisal, purporting to give general authority to Boards of Commissioners of counties to submit such questions to a popular vote, was not enacted with the formalities prescribed in the Constitution. But this was not deemed necessary because the general Act of 1868–'69 passed at a subsequent session of the General Assembly, was reenacted as a part of The Code and was relied on as authority for issuing the bonds.

THE REENACTMENT OF ANY AUTHORITY PURPORTING TO BE CONFERRED BY THE ORIGINAL CHARTER WITHOUT COMPLIANCE WITH THE REQUIREMENTS OF THE CONSTITUTION, WAS NULL AND VOID.

It is not material in the consideration of the question now before us that the Act of August 11, 1868, was assumed by the courts in Hill v. Commissioners, 67 N. C., 367, and in Belo v. Commissioners of Forsyth, 76 N. C., 479, to be a valid act, because it appears that in those cases no evidence was offered to show that said act had not been properly passed, and in the absence of any testimony on the subject, the presumption of course arose that it had been regularly and properly enacted.

The same question arose in Amoskeag National Bank v. Ottawa, supra, where the Court said:

"Nor is it of any importance that the Acts of 1857 had been

assumed to be an existing law in Dunovan v. Green, 57 Ill., 53, and Force v. Battavia, 51 Ill., 99; for in each of those cases the validity of the statutes is not controverted, and by the established practice of that court no evidence of the contents of the Journals could be considered on appeal which had not been produced and made part of the case in the court below."

It would be a strange result of Call's refusal to appeal from the decision of the nisi prius judge, if he could claim the benefit of a private statute, which under the rules of evidence in North Carolina, is not considered by the courts unless offered in evidence and which the parties before the higher court agree is not in evidence, and thus conclude other parties before the court, though he is already estopped from denying that the bonds are invalid.

IF PROPERLY ENACTED, THE ACT OF AUGUST 11, 1868, DID NOT CONFER AUTHORITY ON THE COMMISSIONERS OF WILKES COUNTY TO CREATE A BONDED DEBT AND LEVY A SPECIAL TAX TO PAY IT.

1. Because section 3 of the act declares that the "Commissioners of the county of Forsyth are hereby invested with full powers and authority to levy from time to time such tax as may be sufficient to pay the subscription," and there is no rule of construction that would extend the power given only to a particular county by name, by any sort of implication for any other county. The rigid rule requiring a strict construction of statutes delegating authority to counties and other governmental agencies is clearly stated and well sustained by authority in the opinion of Justice Douglas, filed in the Supreme Court of North Carolina in this case.

2. Supposing for the sake of the argument that the original charter granted by the Convention of 1868 had been reenacted in accordance with the requirements of section 14, article 2, of the Constitution, the bondholders would still have been confronted by an insurmountable barrier to any recovery upon their bonds, in that the authority purporting to be conferred by the charter, (even if we incorporate into it the sections of chapter 136, Laws of 1852, referred to in it), is not sufficiently

specific to meet the demands of article 5, sections 1, 6 and 7 of the Constitution. The charter provides "*That all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules*, regulations and restrictions as are set forth and prescribed in the act incorporating the North Carolina Railroad Company, for the government of such towns and counties as are now allowed to subscribe to capital stock of said company."

There being no special authority given to any particular county to submit the question of subscription to the people or to levy a special tax to pay the indebtedness, the act, if properly passed, fell within the condemnation of the Act of 1885, which was declared invalid in Barksdale v. Commissioners, 93 N. C., supra, because neither "special" nor "local."

The ratification of the charter by the Act of 1868 not being valid, the whole argument of Justice Furches in his dissenting opinion, and that of the Court in Belo v. Commissioners, and Hill v. the Commissioners, where it was treated as a valid act, falls to the ground in its application to the questions raised in the case at bar.

It may be that an act passed after the ratification of the Constitution, on the 24th of April, 1868, might operate to ratify and confirm a *contract of subscription made before the adoption of the Constitution.* Justice Furches says, in his dissenting opinion, 31 S. E. Rep., at page 488, "But this charter was passed and this submission was made and bonds issued *before the adoption of the Constitution of 1868, which did not go into effect until the 24th of April of that year.*" It is needless to speculate about questions that are not raised.

The Act of August 11 does not purport upon its face to ratify any contract except that theretofore made by the county of Forsyth. The language is, "and all acts and things heretofore done under the provisions of the said ordinance are hereby ratified and confirmed." Clearly heretofore meant before August 11, 1868, when the act was passed. The Forsyth County contract having been made, not in contemplation of, but prior to the adoption of the Constitution of 1868, may have been subject to ratification, but it is settled law in North Carolina that a

void contract can not be made valid and operative by an act of the Legislature, for the reasons, (1) that such an act would be judicial legislation; (2) that it would impair the obligation of any contract that would be effected by imparting validity to the void statute.

Stanmire v. Taylor, 48 N. C., 207.
Stanmire v. Powell, 13 Ired., 312.
Lowe v. Harris, 112 N. C., 485 et seq.

In Stanmire v. Taylor, supra, the Court said: "If the Act of 1852 (declaring plaintiff's grant valid) was intended to give life to the void grant under which the plaintiff claimed the premises, by giving a construction to it, the act was a judicial one, which it was not in the power of the Legislature to pronounce. If it be considered purely a legislative grant to the lessor of the plaintiff, then it violates the contract which it made with the defendant Taylor."

If the attempted agreement to pay the bonds was void, its invalidity grew out of the disregard of the Constitutional inhibition in force, when they were issued. To attempt to remedy that infirmity by a curative act would be a palpable effort to evade the prohibitory provision of the Constitution as well as an invasion of the rights of a co-ordinate branch of the Government, by attempting to decide upon the obligations of the taxpayers of the county to pay, and of its creditors to enforce by mandamus the payment of a large bonded debt, palpably void without legislation. Would it not be as clearly void after it was resorted to?

THE SUPREME COURT OF NORTH CAROLINA HOLD THAT NO CONTRACT WAS ENTERED INTO WHICH BINDS THE STATE.

Discussing the question, whether any contract was entered into under the original charter which under the Constitution of the United States, could not be impaired by subsequent State legislation or judicial decisions of the State Court, Justice Douglas, in the opinion filed in the Supreme Court of North Carolina, and which constitutes a part of the record, says:

"Thirdly. That ordinance did not create contract a between

the railroad company and the county of Wilkes. The only contract that has ever existed between them was the contract of 1868, which was subject to all of the Constitutional provisions then existing. The mere authority given in the charter of a railroad company to receive subscriptions from municipal corporations, where no consideration is given and no attempted exercise of the power, has none of the essential elements of a contract and is held at the pleasure of the law-making power. Much more is it subject to Constituional restrictions.

Town of Concord v. Bank, 92 U. S., 625–630.
Concord v. Robinson, 121 U. S., 165–169.
Loan Associaion v. Perry Co., 156 U. S., 692–697."

FOURTH ASSIGNMENT OF ERROR

is as follows:

"4. That the Court erred in holding that the holders of any or all of the $100,000 in bonds, executed by the Board of Commissioners of Wilkes County, and exchanged for the capital stock of the Northwestern North Carolina Railroad Company, the validity of which is the subject of controversy in this action, were estopped by the recital in the face of the bonds issued as to the legislation relied upon to authorize the issue of said bonds. And the said J. M. Turner and J. M. Welburn, plaintiffs in error, say that the said ruling was in violation of section 10, article 1, of the Constitution of the United States, and deprives them of the protection of said section by impairing the obligation of the contract to pay the bonds issued by the plaintiff Board."

Repeated adjudications of the Supreme Court of the United States have established the rule, that every dealer in municipal bonds, which upon their face refer to the statute under which they were issued, is bound to take notice of such enactment and is also chargeable with notice of all infirmities appearing upon the face of such statute, or growing out of mandatory requirements of the organic law of the State, prescribing the mode of enacting them.

McClure v. Oxford, 94 U. S., 429.
Ogden v. Daves, 102 U. S., 634.
Anthony v. Jasper Co., 101 U. S., 693.
McGarahan v. Mining Co., 96 U. S., 316.
Post v. Supervisors, supra.

It is clear, that where parties contract in contemplation of an existing provision of the organic law or an existing statute affecting the validity of the contract, they are charged with notice of such provisions of law just as though they had been incorporated in the contract.

While ordinarily a municipality, after reciting in bonds issued by it, that a statute requiring elections to be held in a certain way and containing other directory provisions had been complied with, is held to be precluded from showing a want of compliance with such provisions of the statute in avoidance of its contract, it is not estopped from showing that a statute recited as authority for issuing such bonds was in fact no law. Holders of the bonds in controversy here can not avail themselves of the claim that they are innocent purchasers, when it appears that the Journals of the Legislature, preserved as evidence of its proceedings would, have shown, if examined by them, that the statute recited was null and void.

German Savings Bank v. Franklin Co., 128 U. S., 526.

But it is needless to discuss this assignment at length if, as is contended for the defendants, none of the other assignments can be sustained, and as a consequence no sufficient authority has been shown for creating the bonded debt.

CONCLUSION.

The defendants contend, upon the admitted facts:

1. That the Commissioners of Wilkes County were not authorized to create the debt either by the Act of 1879 or 1881, because it is admitted that either of said acts were passed as prescribed in the Constitution.

2. That they had no power under the authority conferred by the original charter, standing alone, because it was essential

to the exercise of such power under the Constitution that a new enabling act should have been passed after its ratification.

3. That the Act of August 11, 1868, was no law, because it failed to pass with the prescribed formalities, and therefore did not supply the defects in the original charter by authorizing a subscription after the ratification of the restrictive provisions in the Constitution of 1868.

4. That the Act of August 11, 1868, if it had been enacted in the required manner, would not have conferred authority upon the county of Wilkes to create a debt or levy a special tax for failure to comply with the mandates of article 5, section 6, of the Constitution, and because the ratification applied only to the subscription of Forsyth County, theretofore made.

5. That The Code, sections 1996 to 2000, were no more specific than was the Act of 1885, which was declared in Barksdale v. Commissioners, in the year 1885, and long before the bonds in controversy were issued, to be void because its provisions purporting to confer authority upon counties to levy a school tax were neither local nor special. The defendants contend that the agreement to issue bonds was entered into in contemplation of the decision in Barksdale v. Commissioners.

6. That the agreement to issue bonds was made in contemplation of the definition of an unfinished road given in article 5, section 4, of the Constitution, and in the construction of said article, embodying the language similar to that used in section 1996 of The Code, in Gallaway v. Railroad, 63 N. C., at pages 155, 156 and 158, article 5, section 4, of the Constitution which is as follows:

"Until the bonds of the State shall be at par, the General Assembly shall have no power to contract any new debt or pecuniary obligation in behalf of the State, except to supply a casual deficit, or for suppressing invasion or insurrection, unless it shall in the same bill levy a special tax to pay the interest annually. And the General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroads as may be unfinished at the time of the adoption of this Constitution, or in which the State has a direct pecuni-

ary interest, unless the subject be submitted to a direct vote of the people of the State, and be approved by a majority of those who shall vote thereon."

A. C. AVERY,
Attorney for Defendants.

TURNER v. WILKES COUNTY COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

No. 642. Submitted February 20, 1899. — Decided March 20, 1899.

On a writ of error to a state court this court cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject.

This court is bound by the decision of a state court in regard to the meaning of the constitution and laws of its own State, and its decision upon such a state of facts raises no Federal question; though other principles obtain when the writ of error is to a Federal court.

THIS was a motion to dismiss. The case is stated in the opinion.

Mr. A. C. Avery for the motion.

Mr. Richard N. Hackett opposing.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This action was commenced in the superior court of Wilkes County in the State of North Carolina, by the Board of Commissioners of Wilkes County and C. C. Wright, against Clarence Call. Mr. Wright was a taxpayer of the county, while the defendant Call was its treasurer. The action was brought to test the validity of certain bonds issued by the county of Wilkes in payment of its subscription to the stock of the Northwestern North Carolina Railroad Company.

The defendants Turner and Wellborn were the owners of some of the bonds, and after the bringing of this action they were, on their own motion, brought in as parties defendant, and they invited all other bondholders to come in and join them in resisting the action.

It was claimed by the holders of the bonds that authority for their issue existed under an ordinance chartering the Northwestern North Carolina Railroad Company, which ordinance was adopted by the constitutional convention of North Carolina, March 9, 1868, the constitution being itself ratified April 25, 1868. It was also insisted that the bonds were authorized under sections 1996 to 2000 of the code of North Carolina, as enacted in 1869, and subsequently ratified in 1883; also that the charter of the railroad company, as amended in 1879, and again in 1881, authorized the issuing of the bonds. The bonds were in fact issued in 1890, and therefore subsequent to all the legislation above referred to. The bonds recited on their face that they were issued under the act of 1879.

As grounds for their contention that the bonds were invalid, the plaintiffs below asserted that neither the above mentioned act of 1879, nor the amended act of 1881, had been constitutionally passed; that the bonds were not issued under the ordinance adopted by the constitutional convention; and that by the doctrine of estoppel the bondholders could not claim that the bonds were issued under such ordinance or by virtue of any other authority than that recited on their face, viz., the act of 1879.

The Supreme Court of the State held that the bonds were void because the acts under which they were issued were not valid laws, not having been passed in the manner directed by the constitution. The court further held that the bonds were not authorized by the above sections of the code, and that as they purported, by recitals on their face, to have been issued under the act of 1879, the bondholders were estopped from setting up any other authority for their issue, such as the ordinance of the constitutional convention above mentioned.

The bondholders have brought the case here, claiming that by the decision below their contract has been impaired, because, as they allege, the Supreme Court of the State had decided before these bonds were issued that the acts under which they were issued were valid laws and authorized their issue, and that in holding the contrary after the issue of these bonds the state court had impaired the obligation of the contract,

and its decision raised a Federal question proper for review by this court.

But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because, this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. We are therefore bound by the decision of the state court in regard to the meaning of the constitution and laws of its own State, and its decision upon such a state of facts raises no Federal question. Other principles obtain when the writ of error is to a Federal court.

The difference in the jurisdiction of this court upon writs of error to a state as distinguished from a Federal court, in questions claimed to arise out of the contract clause of the constitution, is set forth in the opinion of the court in *Central Land Company* v. *Laidley*, 159 U. S. 103, and from the opinion in that case the following extract is taken (p. 111):

"The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a State, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the State, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the state court, was reviewed on the merits and reversed by this court, for misconstruction of the constitution of Iowa. *Gelpcke* v. *Dubuque*, 1 Wall. 175, 206. But a writ of error to review one of those decisions of

the Supreme Court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the State to be a law of the State, within the meaning of the provision of the Constitution of the United States forbidding a State to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. *Railroad Co.* v. *McClure*, 10 Wall. 511, 515."

An example of the jurisdiction exercised by this court when reviewing a decision of a Federal court with regard to the same contract clause is found in the same volume. *Folsom* v. *Ninety-six*, 159 U. S. 611, 625.

This case is governed by the principles laid down in *Central Land Company* v. *Laidley*, *supra*, and the writ of error must, therefore, be

Dismissed.